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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1996

JOHN KAYE, Individually, and in his capacity as Monmouth County Prosecutor; THE COUNTY PROSECUTOR'S OFFICE OF THE COUNTY OF MONMOUTH; JOHN DOES 1-100; JANE DOES 1-100

THE COUNTY OF MONMOUTH,
Intervenor in District Court,

Petitioners,

v.

BARBARA COLEMAN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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156 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Third Circuit's decision imposing compensatory and punitive damages against a public entity that was not a party to the litigation violates due process and conflicts with this Court's precedents, including *Richards v. Jefferson County, Ala.*, 116 S. Ct. 1761 (1996).

2. Whether the Third Circuit's decision imposing compensatory and punitive damages against a public entity based on conduct that the entity cannot control, change, prevent, or affect in any way violates due process and conflicts with this Court's precedents, including *BMW of North America, Inc. v. Gore*, 116 S. Ct. 1589 (1996).

3. Whether the Third Circuit violated the principles of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), by disregarding the holding of the New Jersey Supreme Court on a question of state law and instead substituting its own interpretation of the law.

4. Whether a plaintiff in a section 1983 case can recover substantial damages, both compensatory and punitive, for emotional distress based solely on her own subjective, uncorroborated testimony.

PARTIES TO THE PROCEEDING AND DESIGNATION OF CORPORATE RELATIONSHIP

The parties named in the complaint were Barbara Coleman; John Kaye, individually and in his capacity as Monmouth County Prosecutor; and the County Prosecutor's Office of the County of Monmouth. The County of Monmouth intervened in the district court, after the jury returned its verdict, for the purpose of vacating the verdict as to the County. None of these parties has any parent or subsidiary companies.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, the County of Monmouth and John Kaye, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINION BELOW

The opinions of the United States District Court for the District of New Jersey (A-50 to A-91) have not been officially reported. The opinion of the Court of Appeals for the Third Circuit (A-1 to A-46) is reported at 87 F.3d 1491.

STATEMENT OF JURISDICTION

The Court of Appeals entered judgment on June 26, 1996, and denied the Petition for Rehearing and Suggestion for Rehearing In Banc on August 6, 1996. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The Court of Appeals had jurisdiction under 28 U.S.C. § 1291.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part: " . . . nor shall any state deprive any person of life, liberty, or property, without due process of law."

Section 1983 of the federal Civil Rights Act, 42 U.S.C. § 1983, is reproduced at A-94 to A-95. The relevant portions of the New Jersey Law Against Discrimination, N.J. Stat. Ann. 10:5-1 *et seq.* are reproduced at A-95 to A-120.

STATEMENT OF THE CASE

Barbara Coleman, an investigator in the prosecutor's office, sued John Kaye individually and in his capacity as Monmouth County Prosecutor; the County Prosecutor's Office of the County of Monmouth; and unnamed John and Jane Does for gender discrimination for failure to promote her on three occasions. Even though she admitted that she had lost no compensation, Coleman asserted claims under the New Jersey Law Against Discrimination ("LAD"), N.J. Stat. Ann. § 10:5-1 *et seq.*; section 1983 of the federal civil rights act, 42 U.S.C. § 1983; and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. (A-4)

The fictitious defendants never were named as parties. The County of Monmouth ("County") was not named in the complaint and was not referred to in the body of the complaint. (A-4) The County never was served with the complaint, never was listed on the trial court's docket, and never participated in any of the trial court proceedings. The complaint was served on Kaye only. (A-4) The Court of Appeals acknowledged that service on Kaye does not constitute service on the County. (A-9)

Inexplicably, at the conclusion of the trial, the court in its charge to the jury named the County of Monmouth and submitted to the jury an interrogatory referring to

the County as a potentially responsible party. (A-4) The jury returned its liability verdict, specifically finding in response to interrogatories that the County did not have a policy or custom of gender discrimination in promotion decisions. (A-4) The jury found that Kaye and/or his subordinates had discriminated against Coleman only under section 1983 (not under the LAD) by failing to promote her on three occasions. (A-33) The jury awarded Coleman $15,000 in compensatory damages and $350,000 in punitive damages against the County (only under the state LAD); and $10,000 in compensatory damages and $50,000 in punitive damages against Kaye in his individual capacity (only under section 1983). (A-32 to A-33)

After learning of the jury verdict, the County moved in the trial court under Fed. R. Civ. P. 60(b)(4) to intervene in order to vacate the verdict against it – because the County had not been a party to the litigation. The district court granted the County's post-trial motion, holding that: (1) as a matter of procedure, the County was not a party to the action because it was not a named defendant and had not been served; and (2) as a matter of substance, the County could not be liable under the LAD (the only basis for the jury's liability verdict as to the County) for the actions of Kaye because the County exercises no control over Kaye, as required under New Jersey law for employer liability. (A-54, A-57 to A-58) The district court denied Kaye's post-trial motions for judgment N.O.V. and for a new trial, holding that there was sufficient evidence to find Kaye liable for both compensatory and punitive damages. (A-61, A-63)

Both sides appealed. The Third Circuit Court of Appeals reversed the district court as to the County and

affirmed as to Kaye. (A-2 to A-3) With respect to the County, to reach the result that a nonparty can be liable for $365,000 in compensatory and punitive damages, the Court of Appeals, relying largely on certain correspondence from and documents filed on behalf of the Monmouth County Prosecutor's Office (not the County of Monmouth), made its own *factual* determination that the County's interests were "indistinguishable from those of the Monmouth County Prosecutor's Office" (which was legally incorrect), (A-12 to A-13) and that the County had waived the defense of lack of personal jurisdiction by submitting itself to the jurisdiction of the district court. (A-10)

While acknowledging that the County has no control over the conduct of the prosecutor (A-21), to reach the result that a governmental entity can be liable for conduct over which it has no control, the Court of Appeals simply chose to disregard both fundamental Constitutional principles and settled principles of state law and to "impute" the allegedly discriminatory acts of Kaye and his subordinates to the County. (A-31) In addition, the Court of Appeals permitted Coleman's compensatory damages award to be based solely on her subjective testimony of emotional distress – without a single shred of objective corroboration, either through her own testimony or otherwise. (A-34)

In short, the Third Circuit's decision imposes liability for compensatory and punitive damages on an entity that: (1) was not a party in the case; and (2) had no ability to control, change, prevent, or affect in any way the allegedly discriminatory conduct at issue. This petition affords this Court an opportunity to address the important Constitutional issues raised by the Third Circuit's

decision and to resolve an important and recurring conflict among the Courts of Appeals with respect to the type of evidence necessary to support the recovery of damages under section 1983 for emotional distress.

REASONS FOR GRANTING THE WRIT

I. BY IMPOSING COMPENSATORY AND PUNITIVE DAMAGES AGAINST THE COUNTY, WHICH WAS NOT A PARTY TO THE LITIGATION, THE THIRD CIRCUIT'S DECISION VIOLATES THE COUNTY'S CONSTITUTIONAL DUE PROCESS RIGHTS AND CONFLICTS WITH THIS COURT'S PRECEDENTS, INCLUDING *RICHARDS V. JEFFERSON COUNTY, ALA.*, 116 S. CT. 1761 (1996).

The County was not a party to this litigation until after the jury had rendered its verdict, when the County then intervened for the sole purpose of obtaining a ruling that it was not liable because it was not a party. Because it had not been a party, the County could not, and did not, file motions to dismiss or for summary judgment, call witnesses in support of its position, cross-examine plaintiff's witnesses, submit proposed jury instructions, or present any argument to the jury before the verdict was reached. Although the County had compelling defenses to the lawsuit, and although the very basis of the Court's subject matter jurisdiction over the County was highly doubtful,[1] the County was

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[1] Before a district court can exercise supplemental jurisdiction over a state claim, the district court in the exercise of its discretion must determine that the state claim is the proper subject of supplemental jurisdiction. 28 U.S.C. § 1367. No such discretion was exercised here, and in view of the "novel [and] complex issue of State law," 28 U.S.C. § 1367(c)(1), the district

unable to defend itself. Moreover, the County was in no position to object to the submission of its liability to the jury because it was not a party and was not in court. This fact is underscored by the necessity of the County's post-trial motion to intervene in order to rectify what the jury had done as a result of the district court's error in submitting interrogatories to the jury.

Despite these uncontroverted facts, the Third Circuit held that the County's liability was properly before the jury because the County "submit[ted] itself to the jurisdiction of the district court, thereby waiving any claim that the district court lacked *in personam* jurisdiction." (A-10) In this respect, the Court of Appeals misconstrued the distinction between being a party to an action and waiving personal jurisdiction; and not being a party to an action altogether. Even assuming *arguendo* that the County had waived a defense of lack of personal jurisdiction (which it did not),[2] the Court of Appeals ignored the following uncontroverted facts: that the County never was a party to the action, it was not named as a defendant, it was not

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court would have been well within its discretion not to have exercised supplemental jurisdiction over Coleman's LAD claim against the County.

[2] In support of its factual determination that the County was a proper party to the lawsuit because it had waived the defense of lack of personal jurisdiction, the Court primarily relied on certain documents that pertained to the representation of the County Prosecutor's Office of the County of Monmouth (A-10 to A-12), which was named as a defendant in the complaint and which is a separate and distinct entity from the County of Monmouth. There was no argument regarding the effect of these documents in either the district court or the Court of Appeals.

served, it filed no motions, it did not participate in discovery, it did not participate in the trial, and it had nothing to do with the interrogatories submitted to the jury that formed the basis for the verdict against it.

By granting the County's motion to intervene and to vacate, the district court corrected the extraordinary procedural anomaly that had occurred. In turn, the Court of Appeals, by reversing the district court and reinstating the $365,000 verdict against a non-party, effectively permitted an *ex parte* trial against the County, thereby depriving the County of its right to trial by jury and depriving it of its due process rights.

Clearly, if the County was to be named in the charge, submitted to the jury, and exposed to potential liability, it had the right to an opportunity to be heard in a meaningful manner and at a meaningful time. *See Morrissey v. Brewer*, 408 U.S. 471 (1972). Even more fundamentally, the Court of Appeals' holding is irreconcilable with this Court's precedent that an entity cannot be bound by a judgment in a litigation to which it is not a party. *See Martin v. Wilks*, 490 U.S. 755, 761-62 (1989); *Hansberry v. Lee*, 311 U.S. 32, 40 (1940). *See also* Fed. R. Civ. P. 60(b)(4) (verdict entered against non-party is void).

As this Court most recently explained in *Richards v. Jefferson County, Ala.*, 116 S. Ct. 1761, 1765-66 (1996) (citations omitted):

> The limits on a state court's power to develop estoppel rules reflect the general consensus "in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service

> of process." This rule is part of our "deep-rooted historic tradition that everyone should have his own day in court." As a consequence, "[a] judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings."

This is precisely what happened here. At the conclusion of a trial, a non-party that never had been designated as a party or served, was subjected to a $365,000 judgment, $350,000 in punitive damages. Certiorari is warranted to correct this fundamental due process violation and miscarriage of justice. When viewed in light of this Court's unmistakable precedents, the Third Circuit's opinion should not be permitted to stand.

II. BY IMPOSING COMPENSATORY AND PUNITIVE DAMAGES AGAINST THE COUNTY BASED ON CONDUCT THAT THE COUNTY CANNOT CONTROL, CHANGE, PREVENT, OR AFFECT IN ANY WAY, THE THIRD CIRCUIT'S DECISION VIOLATES THE COUNTY'S CONSTITUTIONAL DUE PROCESS RIGHTS AND CONFLICTS WITH THIS COURT'S PRECEDENTS, INCLUDING *BMW OF NORTH AMERICA, INC. V. GORE*, 116 S. CT. 1589 (1996).

The County, a municipal entity under New Jersey law, admittedly was not Coleman's employer. Coleman was employed as an investigator by the county prosecutor under N.J. Stat. Ann. § 2A:157-10. (A-17) The county prosecutor is a constitutionally-established office separate and distinct from other public entities under the New Jersey Constitution. N.J. Const. art. VII, § 2, ¶ 1. The

prosecutor is nominated and appointed by the Governor, with the advice and consent of the New Jersey Senate. *Id.* The County does not have the power either to hire or fire the prosecutor: only the Governor can take such action. N.J. Stat. Ann. § 52:17B-100. Furthermore, all the assistant prosecutors and investigators in the prosecutor's office are hired personally by the prosecutor, serve at the pleasure of the prosecutor alone, and are removable at will by the prosecutor alone. *See* N.J. Stat. Ann. §§ 2A:157-2; *id.* at 157-10; *id.* at 158-15; *id.* at 158-18.1. In short, under New Jersey law the prosecutor has exclusive control over the personnel decisions in his office.[3]

Of primary significance is the Third Circuit's acknowledgment that pursuant to the New Jersey Constitutional and statutory scheme described above, there would have been no way for the County to control, prevent, or remedy the alleged discrimination in the prosecutor's office. (A-22) But the Court's holding begs the essential question: if the County is forced to pay for these alleged transgressions, how does it protect itself against liability and how may it stop such transcressions in the future? The answer is that under the state Constitutional

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[3] Although the prosecutor's office is funded out of the County Treasury, N.J. Stat. Ann. § 40:20-1, this fact does not confer on the County any control over the prosecutor's office. The State of New Jersey requires that the County establish the office and requires that the County fund the office. N.J. Stat. Ann. § 2A:158-7. These are not discretionary items. Should the County, for any reason, including its displeasure with the acts of the prosecutor, decide not to fund or to underfund the office, the prosecutor may apply to the assignment judge of the County for an order compelling the funding. *Id.*

and statutory arrangement, it cannot. The County cannot discipline the prosecutor, the assistant prosecutors, or the detectives. It cannot discharge any of these people. The Third Circuit has imputed to the County all of the responsibility for the actions of these officials, yet the County has no ability to control or in any way supervise them. In short, the Court of Appeals has created a strict imposition of liability where there is no ability to reduce the risk of a damage award or to remedy the violation alleged. Moreover, the Court has done so without any legal authority whatsoever. Indeed, we have searched in vain for any authority to support the result reached by the Court of Appeals.

The Court of Appeals' imposition of compensatory and punitive damages upon a governmental entity for the actions of a person over whom it has no control contravenes well-established Constitutional principles. The due process violation inherent in the imposition of punitive damages on an entity that cannot control the conduct in question is clear from this Court's recent decision in *BMW of North America, Inc. v. Gore*, 116 S. Ct. 1589 (1996). In *BMW*, this Court held that due process was violated by a $2 million punitive damages award based on $4,000 in compensatory damages for economic harm arising from defendant's failure to disclose certain information to plaintiff about his car. Emphasizing "the principle that punitive damages may not be 'grossly out of proportion to the severity of the offense,' " *id.* at 1599 (quoting *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 453 (1993)), this Court articulated three guideposts to

inform a court in its analysis of the propriety of a punitive damages award: the reprehensibility of the defendant's conduct, the ratio of the award to the plaintiff's actual harm, and a comparison to awards in similar cases. *BMW*, 116 S. Ct. at 1599-1603. If application of these guideposts led to the reversal of the punitive damages award in *BMW*, then logically the punitive damages imposed against the County here cannot stand.

Application of the first *BMW* factor alone leads inescapably to the conclusion that the imposition of punitive damages here violates the County's due process rights. In *BMW*, the Court stated that "perhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *BMW*, 116 S. Ct. at 1599. *See also id.* ("exemplary damages imposed on a defendant should reflect the enormity of his offense."); *Smith v. Wade*, 461 U.S. 30, 54 (1983) ("the focus is on the character of the tortfeasor's conduct – whether it is of the sort that calls for deterrence and punishment over and above that provided by compensatory awards"); *Massachusetts Bonding and Ins. Co. v. United States*, 352 U.S. 128, 133 (1956) ("[b]y definition, punitive damages are based upon the degree of the defendant's culpability").

Stating these basic principles demonstrates why the County – which did nothing – and which could have done nothing – to control, change, prevent, or affect the conduct at issue *in any way* – cannot Constitutionally be liable for punitive damages. Far from being reprehensible

– any misconduct by the County is absolutely non-existent.[4] In short, the Court of Appeals made the County strictly liable for punitive damages arising out of events in the prosecutor's office over which the County admittedly has no control and no ability to change, prevent, or affect. The Court's error is underscored in view of the fact that the jury specifically found in answers to interrogatories that the County in fact did not have any discriminatory policies in place.

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[4] The other *BMW* factors also support reversal of the punitive damages award in this case. The ratio of punitive to compensatory damages in this case is 16 to 1. This Court has suggested that the relevant ratio should approximate 10 to 1. *BMW*, 116 S. Ct. at 1602. *See also Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23-24 (1991). In addition, even had the County controlled the conduct at issue and even if some amount of punitive damages would have been appropriate, the excessiveness of this punitive damages award is evident from a comparison of this award to awards in similar cases. *See, e.g., Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927 (5th Cir. 1996) ($150,000 punitive damages award excessive for supervisor's racial slurs and falsifying documents of misconduct); *Fitzgerald v. Mountain States Tel. and Tel. Co.*, 68 F.3d 1257 (10th Cir. 1995) (no punitive damages for alleged inadequate investigation of discrimination charges); *Nicks v. Missouri*, 67 F.3d 699 (8th Cir. 1995) ($70,000 compensatory and $4,500 punitive damages for supervisors' failure to act upon repeated complaints of sexual harassment by fellow employee); *Allahar v. Zahora*, 59 F.3d 693 (7th Cir. 1995) ($10,000 compensatory damages and no punitive damages for refusal to sell house based on race); *Beardsley v. Webb*, 30 F.3d 524 (4th Cir. 1994) ($76,044 compensatory and $8,000 punitive damages for repeated sexual harassment and discrimination after several direct complaints to the offender and his supervisor).

Imposing liability on the County under these circumstances is startling enough; awarding punitive damages is completely unsupportable. As this Court has stated, "[t]o punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort." *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978). Certainly, to punish a governmental entity where it has done all that it possibly (and legally) can do is equally an abridgment of due process.[5]

III. THE COURT OF APPEALS VIOLATED THE PRINCIPLES OF *ERIE R.R. CO. V. TOMPKINS*, 304 U.S. 64 (1938), BY DISREGARDING THE HOLDING OF THE NEW JERSEY SUPREME COURT ON A QUESTION OF STATE LAW AND INSTEAD SUBSTITUTING ITS OWN INTERPRETATION OF THE LAW.

Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938), requires federal courts to apply state law to state claims, regardless of whether the federal court approves of the result reached by the application of state law. The Court of

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[5] It must also be noted that there was no legally sufficient basis for the jury's award of damages against Kaye in his individual capacity under section 1983. The only evidence of Kaye's personal involvement with the promotion decisions at issue was that he had delegated such decisions to his subordinates, that Coleman wrote him two memoranda about her non-promotion, and that he did not personally respond to those memoranda. Liability for compensatory and punitive damages in a section 1983 action (where there is no *respondeat superior* liability) based on such evidence is untenable under this Court's precedents. *See Smith v. Wade*, 461 U.S. 30 (1983); *Monell v. Department of Social Services*, 436 U.S. 658 (1978).

Appeals acknowledged that the New Jersey Supreme Court's decision in *Lehmann v. Toys 'R' Us, Inc.*, 626 A.2d 445 (N.J. 1993), requires that agency principles govern the scope of employer liability under the LAD. (A-15) But because the application of *Lehmann* would lead to what the panel described as an "untenable conclusion," (A-14) the Court, in defiance of *Erie*, disregarded *Lehmann* and instead to substitute its own test for employer liability, which was to ascertain to which governmental entity the prosecutor most closely "belongs" when making personnel decisions, and then to "impute" liability to that entity, (A-24, A-31). In so doing, the Court of Appeals ignored both the due process rights of the County not to be responsible for damages for conduct over which it has no control (discussed above), and the Constitutional obligations of a federal court applying state law under *Erie*.

The New Jersey Supreme Court's decision in *Lehmann* was a landmark decision that conclusively established the scope of an employer's liability for sexual harassment claims brought under the LAD. The Court held that in instances of supervisory liability, strict liability theories apply only to relief that is equitable in nature. *Lehmann*, 626 A.2d at 460. Before an employer can be held liable for compensatory damages, the Restatement (Second) of Agency § 219 test for liability of a master for the torts of a servant must be satisfied. 626 A.2d at 461. Finally, *Lehmann* held that punitive damages may be imposed only "when the wrongdoer's conduct is especially egregious," and that "the employer should be liable for punitive damages only in the event of actual participation by upper management or willful indifference." 626 A.2d at 464.

In its opinion, the Third Circuit expressly recognized that under New Jersey law, the County has absolutely no ability to control or in any way to affect Kaye's employment decisions and, accordingly, that under *Lehmann* the County could not be liable. (A-21 to A-22) But not satisfied with that result, the Court of Appeals took upon itself completely to disregard *Lehmann* in favor of a different test of its own creation. (A-22 to A-24) As the Court stated:

> The extension of *Lehmann's* agency principles to Coleman's sex discrimination suit against the County of Monmouth is logically unacceptable because county prosecutors are clearly government officials who, reason dictates, must be acting on behalf of some governmental entity when they make personnel decisions. The agency paradigm fails here because it requires us to reach the specious conclusion that Prosecutor Kaye was not acting under the authority of any state governmental body, either state or county, when he passed Coleman over for promotion.

(A-23 to A-24) The Court's refusal to follow the clear, black letter holding of the New Jersey State Supreme Court on an issue solely of New Jersey law not only violates *Erie*, but also is fundamentally unfair.

As set forth in *Lehmann*, the underlying theory of *respondeat superior* is that an employer will be held liable for the actions of his or her employee because the employer has the ability to control the employee. *See Lehmann*, 626 A.2d at 464. Here, despite the absence of any indicia whatsoever of a master-servant relationship, the County is deemed financially responsible for the

actions of persons it did not hire, cannot control, and cannot discipline.

Lehmann makes clear why the master-servant relationship, missing here, is essential to a finding of employer liability in discrimination cases. In *Lehmann*, the New Jersey Supreme Court emphasized that "[f]or the remedial purpose of the LAD to be fulfilled, the employer must take action, because generally the employer is the party with the power and responsibility to hire, promote, reinstate and provide back pay, and take other remedial action." 626 A.2d at 460. The purpose behind the employer liability provisions of the LAD as detailed in *Lehmann* was to provide employers with "the incentive not only to provide voluntary compliance programs but also to insist on the effective enforcement of their programs." 626 A.2d at 465.

In order to accomplish these purposes, *Lehmann* held that an employer may defend a LAD action based upon a showing that it has in place anti-discrimination policies for complaints, training, and monitoring. 626 A.2d at 463. By reaching the illogical conclusion it has in this case, the Third Circuit has removed from consideration the fundamental policies underlying *respondeat superior* as applied to discrimination claims, as well as all of the defenses available to any other employer under the LAD. The County in fact has significant and pervasive anti-discrimination measures in place. Similarly, the County has standards and policies in effect with respect to promotions. However, none of these policies is applicable or binding upon the prosecutor's office or the prosecutor himself because under state law the County cannot exercise any

control over the promotion or hiring policies of the prosecutor. Those personnel decisions are exclusively the prosecutor's to make under the New Jersey statutory scheme. Therefore, the Third Circuit has carved out a strict liability exception to the governing state law under the LAD, has stripped the County of the defenses available to every other employer under the LAD, and has abolished completely the New Jersey punitive damages requirement of "actual participation" or "willful indifference."

While the Court of Appeals may have preferred that New Jersey law were otherwise, the blunt fact is that under the New Jersey Supreme Court's decision in *Lehmann*, the County can be liable for damages only for the acts of its agents, and, under the New Jersey Constitutional and statutory scheme, the prosecutor is not the County's agent. Accordingly, the Court of Appeals' decision violates the principles established by *Erie* and should be reversed.

IV. THE ISSUE OF WHAT EVIDENCE IS NECESSARY TO RECOVER DAMAGES FOR EMOTIONAL DISTRESS IN A SECTION 1983 CASE IS IMPORTANT AND RECURRING AND HAS CREATED MUCH CONFUSION AMONG THE CIRCUITS.

In *Carey v. Piphus*, 435 U.S. 247 (1978), this Court established the standards for the recovery of damages for emotional distress under section 1983. Noting that damage awards under 42 U.S.C. § 1983 are to be governed by common law principles of compensation applicable to tort claims, the Court explained that a second level of evidentiary support must be satisfied before damage awards in Constitutional cases will be upheld: the

plaintiff must demonstrate the existence of a "genuine injury," which, this Court instructed, may be "evidenced by one's conduct and observed by others." 435 U.S. at 257-58, 264 n.20. Moreover, the Court warned that "[j]uries must be guided by appropriate instructions, and an award of damages must be supported by competent evidence concerning the injury." 435 U.S. at 264 n.20. Accordingly, under *Carey*, a plaintiff who fails to present sufficient evidence to support a claim of "actual injury" is entitled to recover no more than nominal damages. 435 U.S. at 266.

Since *Carey*, the issue of what is "competent evidence" sufficient to establish "actual injury" in a section 1983 case – and, in particular, whether the subjective, uncorroborated testimony of a plaintiff is sufficient to meet this standard – has caused confusion and uncertainty among the circuit courts. Most Courts of Appeals have rejected conclusory, subjective, uncorroborated testimony from a plaintiff as an insufficient basis upon which to uphold an award for emotional distress (or as warranting only nominal damages). Other Courts of Appeals have interpreted the *Carey* requirement that a plaintiff establish "actual injury" by "competent evidence" more broadly to allow substantial compensatory damage awards based solely on a plaintiff's conclusory, subjective, uncorroborated testimony. In view of the lack of uniformity among the federal courts on this important and recurring issue of federal law, this Court should take this opportunity to set forth uniform and predictable guidelines regarding the precise measure of evidence necessary to support a claim for emotional distress in a section 1983 case.

Here, Coleman's evidence on compensatory damages consisted solely of her own testimony about her feelings of "anger," "disappointment," "hopelessness," and "depression" upon learning that others within the prosecutor's office had been promoted. Coleman presented *no medical or psychiatric evidence of emotional distress.* She testified that she never consulted a psychiatrist, psychologist, social worker, or, for that matter, even the counsel of a friend to deal with her problem. Moreover, Coleman stipulated that she suffered no loss of wages and, that except for the time she spent pursuing her legal claims in connection with this action, did not miss any time from work. Thus, based solely on her *own* description of anger, disappointment, and depression, Coleman is able to recover substantial monetary damages and substantial counsel fees, all of which must be paid for by the innocent taxpayers of Monmouth County.

The Third Circuit's decision to uphold Coleman's compensatory damage award based solely on her subjective, self-serving, and uncorroborated testimony illustrates quite clearly the confusion and unpredictability that has ensued in this post-*Carey* era. The Third Circuit declined to require Coleman to prove the existence of "actual injury" with objective, corroborative evidence. Instead, it found that Coleman had sufficiently demonstrated an actual injury "because a reasonable jury could credit Coleman's testimony as to the personal anguish she suffered as a result of being passed over for promotion."[6] (A-34 to A-35) In so holding, the Third Circuit

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[6] The Third Circuit's reliance on this Court's decision in *Memphis Community Sch. Dist. v. Stachura*, 477 U.S. 299 (1986), is

joined a minority of courts that have interpreted this Court's holding in *Carey* to allow a plaintiff to demonstrate "actual injury" in a section 1983 case through his or her own subjective, uncorroborated testimony. *See United States v. Balistrieri*, 981 F.2d 916, 932 (7th Cir. 1992), *cert. denied*, 510 U.S. 812 (1993); *DeNieva v. Reyes*, 966 F.2d 480, 487 (9th Cir. 1992); *Chalmers v. City of Los Angeles*, 762 F.2d 753, 761 (9th Cir. 1985); *Crawford v. Garnier*, 719 F.2d 1317, 1324 (7th Cir. 1983); *Williams v. Trans World Airlines, Inc.*, 660 F.2d 1267, 1272-73 (8th Cir. 1981).

In contrast to the Court's approach in *Coleman*, other Courts of Appeals have interpreted *Carey* strictly and have disallowed awards or permitted awards of only nominal damages in circumstances where the only evidence of emotional distress is the plaintiff's own subjective, uncorroborated testimony. *See Price v. City of Charlotte*, 93 F.3d 1241, 1254, (4th Cir. 1996); *Hetzel v. County of Prince William*, 89 F.3d 169, 171-73 (4th Cir. 1996); *Biggs v. Village of Dupo*, 892 F.2d 1298, 1304 (7th Cir. 1990); *Rakovich v. Wade*, 819 F.2d 1393, 1399 n.6 (7th Cir.), *vacated on other grounds*, 850 F.2d 1179 (7th Cir. 1987), *cert. denied*, 488 U.S. 968 (1988); *Cohen v. Board of Educ., Smithtown Cent. Sch. Dist. No. 1*, 728 F.2d 160, 162 (2d Cir. 1984);

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erroneous. *Stachura* does not discuss the quantity or quality of evidence necessary to support an award of substantial damages in a Constitutional deprivation case but rather extends the holding of *Carey* to claims for "impairment of reputation . . . , personal humiliation, and mental anguish and suffering." 477 U.S. at 307 (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)). Nothing in *Stachura* obviates the need for a plaintiff to prove personal humiliation, mental anguish, and suffering through substantial evidence.

Nekolny v. Painter, 653 F.2d 1164, 1172 (7th Cir. 1981); *see also Spence v. Board of Educ. of Christiana Sch. Dist.*, 806 F.2d 1198, 1201 (3d Cir. 1986).

Courts of appeals assessing emotional distress damages in cases brought under 42 U.S.C. § 1981 have experienced similar confusion. Some have applied the teaching of this Court in *Carey* strictly, and have recognized that subjective, uncorroborated testimony from a plaintiff – without more – is insufficient to support an award of substantial damages. Indeed, in *Gunby v. Pennsylvania Elec. Co.*, 840 F.2d 1108, 1120-21 (3d Cir. 1988), *cert. denied*, 492 U.S. 905 (1989), the Third Circuit itself reversed a section 1981 emotional distress damage award of $15,000 where the only evidence presented was vague testimony that the plaintiff felt he had been treated unjustly and that he was "very upset" when informed of the decision not to interview him for a promotion. *See also Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927, 939 (5th Cir. 1996); *Fitzgerald v. Mountain States Tel. and Tel. Co.*, 68 F.3d 1257, 1265-66 (10th Cir. 1995); *Vance v. Southern Bell Tel. and Tel. Co.*, 863 F.2d 1503, 1516 (11th Cir. 1989); *Ramsey v. American Air Filter Co., Inc.*, 772 F.2d 1303, 1313 (7th Cir. 1985); *Erebia v. Chrysler Plastic Prod. Corp.*, 772 F.2d 1250, 1259 (6th Cir. 1985), *cert. denied*, 475 U.S. 1015 (1986).

Other section 1981 cases, however, have held to the contrary and have allowed awards of substantial compensatory damages based solely on the testimony presented by the plaintiff. *See, e.g., Block v. R.H. Macy & Co., Inc.*, 712 F.2d 1241, 1245 (8th Cir. 1983); *Gore v. Turner*, 563 F.2d 159, 164 (5th Cir. 1977); *Smith v. Anchor Bldg. Corp.*, 536 F.2d

231, 236 (8th Cir. 1976); *Seaton v. Sky Realty Co., Inc.*, 491 F.2d 634, 636 (7th Cir. 1974).

The view shared by a majority of courts – *i.e.*, the view that rejects a plaintiff's self-serving, uncorroborated testimony as the sole basis for emotional distress awards – comports with other federal court decisions that have analyzed emotional distress claims under the common law. In these decisions, courts have demonstrated a clear reticence to award compensatory damages for emotional distress without adequate support. *See, e.g.*, W. Page Keeton, et al., *Prosser & Keeton on the Law of Torts*, § 12, at 64 (5th ed. 1984). Significantly, this Court, too, has recognized that courts must restrict emotional distress claims in view of "[t]he potential for a flood of trivial suits, the possibility of fraudulent claims that are difficult for judges and juries to detect and the specter of unlimited and unpredictable liability." *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 114 S. Ct. 2396, 2411 (1994).[7]

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[7] For these reasons, in negligent infliction of emotional distress cases, many courts have required medically-provable and diagnosable mental distress in order to give rise to damages. *See, e.g., Aurora v. Burlington N.R.R. Co.*, 31 F.3d 724, 726 (8th Cir. 1994); *Silver v. Mendel*, 894 F.2d 598, 607 n.19 (3d Cir. 1990), *cert. denied*, 496 U.S. 926 (1990); *Bass v. Nooney Co.*, 646 S.W.2d 765, 772-73 (Mo. 1983) (*en banc*); *Parrish v. Omaha Pub. Power Dist.*, 496 N.W.2d 914, 915-16 (Neb. 1993); *Kohn v. Schiappa*, 656 A.2d 1322, 1325 (N.J. Super. Ct. Law Div. 1995); *Leone v. Leewood Serv. Station*, 624 N.Y.S.2d 610, 613 (N.Y. App. Div.), *appeal denied*, 658 N.E.2d 221 (N.Y. 1995); *Muchow v. Lindblad*, 435 N.W.2d 918, 923 (N.D. 1989); *Camper v. Minor*, 915 S.W.2d 437, 446 (Tenn. 1996); *Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970, 974-75 (Utah 1993). *See generally* Restatement (Second) of Torts § 436A, cmt. b (1965).

CONCLUSION

This is one of the rare cases in which certiorari is warranted not only because of the serious Constitutional violations, but also because a fundamental injustice occurred in the Court of Appeals: a governmental entity that was not named in the complaint, that was not served with the complaint, and that did not participate in the trial was held liable for substantial compensatory and punitive damages. To make matters worse, that governmental entity had absolutely no ability to control, change, prevent, or affect in any way the alleged conduct that gave rise to the damages at issue. Such a decision clearly violates the precepts of this Court, fundamental due process, and plain fairness.

This petition should be granted to correct this unconstitutional and unprincipled result, as well as to clarify the standard for recovery of damages for emotional distress under section 1983. In view of the egregious nature of the case, the Court may in the alternative choose to summarily vacate the judgment and remand to the Court of Appeals with instructions for that Court to address the serious due process and *Erie* violations, as well as the

appropriate standard to be applied in dealing with damages for emotional distress in section 1983 actions.

Respectfully submitted,

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Dated: November 1, 1996.

No. _____

In The

Supreme Court of the United States

October Term, 1996

JOHN KAYE, Individually, and in his capacity as Monmouth County Prosecutor; THE COUNTY PROSECUTOR'S OFFICE OF THE COUNTY OF MONMOUTH; JOHN DOES 1-100; JANE DOES 1-100

THE COUNTY OF MONMOUTH, Intervenor in District Court,

Petitioners,

v.

BARBARA COLEMAN,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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Filed June 26, 1996

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 95-5439/5469/5708/5742

BARBARA COLEMAN,

Appellant Nos.
95-5439/5742

v.

JOHN KAYE, Individually, and in his capacity as Monmouth County Prosecutor; COUNTY PROSECUTOR'S OFFICE OF THE COUNTY OF MONMOUTH; JOHN DOES, 1-100; JANE DOES, 1-100

COUNTY OF MONMOUTH,

Intervenor in D.C.

BARBARA COLEMAN

v.

JOHN KAYE, Individually, and in his capacity as Monmouth County Prosecutor; THE COUNTY PROSECUTOR'S OFFICE OF THE COUNTY OF MONMOUTH; JOHN DOES, 1-100; JANE DOES, 1-100

COUNTY OF MONMOUTH

Intervenor in D.C.

John Kaye,

Appellant Nos.
95-5469/5708

On Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 91-cv-01140)

Argued April 29, 1996

Before: COWEN and ROTH, *Circuit Judges* and
CINDRICH, *District Judge**

OPINION OF THE COURT

COWEN, *Circuit Judge.*

Plaintiff-appellant Barbara A. Coleman[1] appeals an order of the district court granting defendant-appellee Monmouth County's post-trial motion to vacate a jury verdict of $15,000 in compensatory damages and $350,000 in punitive damages based upon three findings of intentional sex discrimination. The principal questions we must decide are whether county prosecutors in New Jersey act as state or county officials when they make personnel decisions and whether the district court properly exercised *in personam* jurisdiction. We hold that county prosecutors act on behalf of the county in this setting. We further hold that the County of Monmouth has waived any defense of lack of personal jurisdiction. *See* FED. R. CIV. P. 12(h)(1). Accordingly, we will reverse the May 4, 1995 order of the district court vacating the jury verdict against the County of Monmouth.

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* Honorable Robert J. Cindrich, United States District Judge for the Western District of Pennsylvania, sitting by designation.

[1] Barbara Coleman died while this case was on appeal. Shamren Leigh Coleman-Fletcher, Barbara Coleman's daughter and executrix, filed a petition to be substituted as the appellant. We granted the motion to substitute pursuant to FED. R. APP. P. 43(a).

The jury also found Prosecutor Kaye to be liable in his individual capacity for $10,000 in compensatory damages and $50,000 in punitive damages. Kaye appeals the district court's denial of his Rule 50(b) motion for judgment as a matter of law on the ground of evidentiary insufficiency. As we find sufficient evidence in the record to support a finding of liability against Kaye for both compensatory and punitive damages, we will affirm the district court's denial of Kaye's motion. Furthermore, since the jury verdict against the County of Monmouth must be reinstated, liability for the payment of attorneys' fees must be apportioned between Kaye and the County of Monmouth, and we will remand the matter for further proceedings consistent with this opinion.

I.

Barbara Coleman was employed as an investigator at the Monmouth County Prosecutor's Office during John Kaye's tenure as Monmouth County Prosecutor. As County Prosecutor, Kaye had plenary authority in deciding whom to hire, fire, promote or demote at the Monmouth County Office. Although Kaye received input from subordinates as to the qualifications of persons considered for promotion, it is uncontested that he possessed the final authority to determine who worked for the Monmouth County Prosecutor and in what capacity.

Coleman applied for promotions at the Monmouth County Prosecutor's Office in May of 1989, June of 1990 and October of 1990. In May of 1989 Coleman sought to be promoted to either sergeant or lieutenant. She was not

promoted to either position. Similarly, Coleman's applications to be promoted to sergeant were denied in both June and October of 1990. On all three occasions, a male investigator was promoted over Coleman.

On March 12, 1991, Coleman filed a complaint in the District Court for the District of New Jersey naming as parties John Kaye, individually and in his official capacity as Monmouth County Prosecutor, the County Prosecutor's Office of the County of Monmouth, John Does 1-100 and Jane Does 1-100. The County of Monmouth was not named separately as a defendant. The complaint alleged that the defendants had discriminated against Coleman based upon her sex by failing to promote her to sergeant (three times) and lieutenant (once) on various occasions in 1989 and 1990. Coleman brought claims under 42 U.S.C. § 1983, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and pendent state claims under the New Jersey Law Against Discrimination ("LAD"), N.J. STAT. ANN. § 10:5-1 *et seq.* The summons and complaint were served upon Kaye, who also accepted service on behalf of the Monmouth County Prosecutor's Office.

This matter proceeded to trial in district court on September 20, 1994. On September 29, 1994, the case was sent to the jury, which made the following pertinent factual findings: (1) Prosecutor Kaye had intentionally discriminated against Coleman based upon her sex by not promoting her to sergeant in June of 1990 and October of 1990; (2) the County of Monmouth did not adopt a policy or custom of sex discrimination that resulted in Coleman not being promoted in May of 1989, June of 1990 or October of 1990; (3) Kaye and/or one or more of his

subordinates who made recommendations to him intentionally discriminated against Coleman because she was a woman, and such discrimination proximately caused her to be passed over for promotion in May of 1989, June of 1990 and October of 1990; and (4) Kaye and/or one of his subordinates did not intentionally discriminate against Coleman in retribution for her filing a complaint with the Equal Employment Opportunity Commission ("EEOC"). The jury's award of compensatory and punitive damages against both the County of Monmouth and Prosecutor Kaye was based upon these findings. The verdict sheet that the district court submitted to the jury to record its findings provided no separate section in which it could articulate the precise grounds upon which the parties had been held liable.

Faced with the prospect of paying a substantial damages award, the County of Monmouth filed a motion to intervene pursuant to FED. R. CIV. P. 24, which was granted by the district court. Monmouth County also filed a motion pursuant to FED. R. CIV. P. 60(b)(4) to vacate the jury verdict. The County argued that the jury verdict should be vacated because Coleman had not properly effected service of process upon the County. It also contended that Prosecutor Kaye is a state official over whom the County exercised no control. Monmouth County maintained that New Jersey law requires a finding of "control" in order for it to be held liable in damages under the LAD.[2] The County argued that since it had no

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[2] Since the jury found that the County of Monmouth had no policy of discrimination, the district court entered judgment against the County under the New Jersey LAD.

control over Kaye's personnel decisions, then *a fortiori* county prosecutors in New Jersey are not agents of the counties they serve. Thus, Monmouth County argued that even if county prosecutors engage in acts of intentional discrimination against their own employees, such conduct nonetheless cannot expose the counties to liability under the LAD.

The district court found the County of Monmouth's arguments to be convincing and granted its motion to vacate Coleman's jury verdict against the County on two alternative grounds. The district court held that it had lacked *in personam* jurisdiction to enter a judgment against the County of Monmouth because it had not been served properly under either FED. R. CIV. P. 4(j)(2) or N.J. CT. R. 4:4-4(a)(8), the local procedural rule to which Rule 4(j) refers. Alternatively, the district court found that the County of Monmouth could not be held liable under the New Jersey LAD premised upon a theory of *respondeat superior* for the actions of Prosecutor Kaye. Applying the agency principles adopted by the New Jersey Supreme Court in *Lehmann v. Toys 'R' Us, Inc.*, 626 A.2d 445 (N.J. 1993), the district court held that there was no master/servant relationship between the County of Monmouth and Prosecutor Kaye. On the contrary, the district court concluded that "county prosecutors are controlled by the Attorney General for the State of New Jersey[,] a member of the New Jersey executive branch of government." *Coleman v. Kaye*, No. 91-1140, slip op. at 7 (D.N.J. May 4, 1995).

Prosecutor Kaye responded to the October 17, 1994 jury verdict against him by filing a FED. R. CIV. P. 50(b) motion for judgment as a matter of law, arguing that

there was insufficient evidence in the record to support a finding that he had discriminated against Coleman. Kaye also argued that there was an insufficient foundation in the record to support an award of either compensatory or punitive damages against him. The district court denied Kaye's Rule 50(b) motion in its May 4, 1995 order.

On September 7, 1995, the district court granted Coleman's application for attorneys' fees and costs. The order provided that Coleman's counsel be awarded $101,184.00 in attorneys' fees and $3,968.92 in costs. Since the County of Monmouth had already been dismissed from this action, Prosecutor Kaye was ordered to pay the entire sum of $105,152.92. This appeal followed.

II.

The district court had jurisdiction pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 1343(a)(3) and 28 U.S.C. § 1367. We have jurisdiction under 28 U.S.C. § 1291. We exercise plenary review over jurisdictional issues. *Anthuis v. Colt Indus. Operating Corp.*, 971 F.2d 999, 1002 (3d Cir. 1992). Our review of the district court's interpretation and application of state law is plenary, *Hofkin v. Provident Life & Accident Ins. Co.*, 81 F.3d 365, 369 (3d Cir. 1996), as is our review of a denial of a motion for judgment as a matter of law. *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1166 (3d Cir. 1993). A Rule 50(b) "motion should be granted only if, viewing the evidence in the light most favorable to the nonmovant and giving it the advantage of every fair and reasonable inference, there is insufficient evidence from which a jury reasonably could find liability." *Id.*

Punitive damages may be awarded for violation of the New Jersey LAD "when the wrongdoer's conduct is especially egregious." *Lehmann v. Toys 'R' Us, Inc.*, 626 A.2d 445, 464 (N.J. 1993) (quoting *Leimgruber v. Claridge Assocs.*, 375 A.2d 652, 654 (N.J. 1977)). Therefore, "the employer should be liable for punitive damages only in the event of actual participation by upper management or willful indifference." *Id.* Similarly, punitive damages may be awarded under 42 U.S.C. § 1983 "when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." *Smith v. Wade*, 461 U.S. 30, 56, 103 S. Ct. 1625, 1640 (1983).

"We review the reasonableness of an award of attorney's fees for an abuse of discretion." *Rode v. Dellarciprete*, 892 F.2d 1177, 1182 (3d Cir. 1990). Our review is plenary "when a district court fails to apply the appropriate standards for granting legal fees. . . . " *Board of Trustees of Trucking Employees of North Jersey Welfare Fund, Inc.-Pension Fund v. Centra*, 983 F.2d 495, 508 (3d Cir. 1992).

III.

Although Coleman's suit against the County of Monmouth and Prosecutor Kaye arose from the same underlying facts, the claims that the defendants raise on appeal require the resolution of entirely different issues. We will therefore address their various contentions in separate sections. First, we will address Coleman's appeal, which assails the two grounds upon which the district court vacated the jury verdict against the County of Monmouth.

A.

The district court relied upon FED. R. CIV. P. 4(j)(2) and New Jersey Court Rule 4:4-4(a)(8) to support its conclusion that the court lacked *in personam* jurisdiction over Monmouth County. Rule 4(j)(2) provides that

> [s]ervice upon a state, municipal corporation, or other governmental organization subject to suit shall be effected by delivering a copy of the summons and of the complaint to its chief executive officer or by serving the summons and complaint in the manner prescribed by the law of that state for the service of summons or other like process upon any such defendant.

FED. R. CIV. P. 4(j)(2). The manner of service prescribed under the local New Jersey rules is set forth in N.J. CT. R. 4:4-4(a)(8), which provides, in relevant part, that service must be effected "by serving a copy of the summons and complaint . . . on the presiding officer or on the clerk or secretary thereof." Reading these two provisions together, the district court concluded that since Kaye "is not the presiding officer, clerk or secretary of the County of Monmouth . . . plaintiff did not properly effect service of the summons and complaint upon the County of Monmouth." *Coleman v. Kaye*, No. 91-1140, slip op. at 4 (D.N.J. May 4, 1995). As such, the court concluded that "the jury's verdict . . . against the County of Monmouth cannot stand." *Id.*

The district court was correct to the extent that it concluded that Kaye did not fit the proper description of anyone designated to receive service of process on behalf of the County of Monmouth under either Rule 4(j) or N.J. CT. R. 4:4-4(a)(8). Moreover, as we explained in *Grand*

Entertainment Group, Ltd. v. Star Media Sales, Inc., 988 F.2d 476, 492 (3d Cir. 1993), "[a] district court's power to assert *in personam* authority over parties defendant is dependent not only on compliance with due process but also on compliance with the technicalities of Rule 4." This analysis is not controlling, however, when a party submits itself to the jurisdiction of the district court, thereby waiving any claim that the district court lacked *in personam* jurisdiction. *See* FED. R. CIV. P. 12(h)(1).[3] This is exactly what happened here.

The County of Monmouth became involved in this lawsuit both before and after Coleman filed her complaint in district court. For example, before commencing the present action in district court, Coleman submitted a complaint to the EEOC. Monmouth County elected to respond to Coleman's EEOC complaint. Assistant Monmouth County Counsel Robert Hrebek sent a letter to Joe G. Rosenberg, the Supervisory Investigator of the EEOC, advising him that Hrebek had "been assigned to handle

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[3] Rule 12(h)(1) of the Federal Rules of Civil Procedure provides as follows:

> **(h) Waiver or Preservation of Certain Defenses**
>
> (1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment permitted by Rule 15(a) to be made as a matter of course.

[this matter] on behalf of the Monmouth County Prosecutor by Malcolm V. Carton, Esq., Monmouth County Counsel . . . [and to] please direct all future correspondence in this case to my attention as Assistant County Counsel." App. at 145.

After Coleman filed her complaint, Special County Counsel Richard T. O'Connor sent a letter, dated August 12, 1993, to the clerk of the court. In this letter, O'Connor requested the clerk to

> enter the appearance of the firms of Gerald L. Dorf, P.C. and Malcolm V. Carton, Monmouth County Counsel, by Richard T. O'Connor, Special County Counsel, on behalf of Defendants John Kaye individually and in his capacity as Monmouth County Prosecutor and the County Prosecutor's Office of the County of Monmouth in the above-captioned matter.

Id. at 141. The August 12, 1993 letter listed both O'Connor and Dorf as "Attorneys for Defendants John Kaye and the County Prosecutor's Office of the County of Monmouth." *Id.*

At no time did representatives from the County Counsel's Office ever interpose an objection on jurisdictional grounds. *See* 5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1344, at 173 (2d ed. 1990) ("If defendant appears in the action, he must interpose any . . . objections he may have by motion or in his answer or they will be deemed waived by virtue of Rule 12(h)(1)."). Quite to the contrary, the representations made by attorneys from the County Counsel's Office indicate that Monmouth County was acutely aware of its possible exposure in this matter. To illustrate, a letter

dated March 3, 1992 sent by Special County Counsel O'Connor to Linda B. Kenney, Coleman's attorney, contains the following admission in the opening sentence: "As you know, I represent *Monmouth County* in the above-captioned matter." App. at 148 (emphasis added). In addition, Special Counsel O'Connor noted in a letter memorandum to the district court dated January 3, 1991, that *"[t]he County of Monmouth* shall rely upon the legal arguments and contentions contained in its supporting brief. . . . " *Id.* at 153 (emphasis added).

In addition to the foregoing, Assistant County Counsel Hrebek filed papers and motions in this action on behalf of Kaye and the Monmouth County Prosecutor's Office. On April 30, 1991, Hrebek applied to the district court for an order granting the Monmouth County Prosecutor's Office a thirty-day extension to file an answer or a responsive pleading. This letter listed Hrebek as the "Attorney for Defendants." *Id.* at 611. The district court granted Hrebek's motion. Moreover, on May 28, 1991, Hrebek received an additional fifteen-day extension to file an answer on behalf of Kaye and the Monmouth County Prosecutor's Office. Assistant County Counsel Hrebek did not interpose the defense of lack of personal jurisdiction with respect to the County of Monmouth in any one these responsive pleadings.

Finally, on May 24, 1991, Gerald Dorf, Esq., entered an appearance on behalf of John Kaye "as an individual." *Id.* at 609. Dorf was retained by Kaye with Monmouth County funds. Given the County's pervasive involvement in the litigation of this matter and the County Counsel's Office's open acknowledgement that it was representing the County's interests, which by all appearances were

indistinguishable from those of the Monmouth County Prosecutor's Office, we conclude that Monmouth County's defense of lack of personal jurisdiction had effectively been waived long before the County, seemingly as an afterthought, filed its post-trial motion to vacate on jurisdictional grounds. We therefore hold that the County of Monmouth was properly before the district court as a party.

B.

The County of Monmouth also contends that it cannot be held accountable for Prosecutor Kaye's actions because he is a state official over whom the County exercises no control. The district court agreed, concluding that Prosecutor Kaye was controlled by the New Jersey State Attorney General. This is an issue of first impression, as the New Jersey Supreme Court has yet to address the specific issue of whether a county prosecutor acts as a state or county official when making personnel decisions at the county level.

A review of related authorities leads us to conclude that county prosecutors in New Jersey can be characterized as having a dual or hybrid status. It is well established that when county prosecutors execute their sworn duties to enforce the law by making use of all the tools lawfully available to them to combat crime, they act as agents of the State. On the other hand, when county prosecutors are called upon to perform administrative tasks unrelated to their strictly prosecutorial functions, such as a decision whether to promote an investigator, the county prosecutor in effect acts on behalf of the

county that is the situs of his or her office. We therefore predict that the New Jersey Supreme Court, if presented with a case in this posture, would hold that county prosecutors are acting on behalf of the county when they make personnel decisions.

This conclusion requires us to reach a related issue. The district court determined that the application of agency principles, as set forth in the New Jersey Supreme Court's decision in *Lehmann v. Toys 'R' Us, Inc.*, 626 A.2d 445 (N.J. 1993), provided the analytical framework under which Coleman's claims against the County of Monmouth should be scrutinized. We disagree.

Neither the State nor the County of Monmouth exercised "control" over Prosecutor Kaye's personnel decisions. If *Lehmann* were held to be controlling in this context, this would lead to the untenable conclusion that Prosecutor Kaye was acting on behalf of neither the State nor the County of Monmouth when he passed over Coleman for promotion. We therefore hold that the application of strict agency principles is inappropriate in this setting. As the New Jersey LAD is intended to combat intentional discrimination, and given that intentional discrimination was perpetrated by county officials here, we predict that the New Jersey Supreme Court would hold that Kaye was the Monmouth County policymaker in regard to personnel actions in the prosecutor's office and that the County of Monmouth may be held liable for the acts of intentional discrimination that occurred.

1.

The New Jersey Supreme Court in *Lehmann v. Toys 'R' Us, Inc.*, 626 A.2d at 445, set forth the applicable standard to determine whether an employer can be held liable under the LAD when an employee raises a hostile environment sexual harassment claim against a supervisor. *Lehmann* held that in this context, *respondeat superior* liability would lie if the agency principles set forth in the RESTATEMENT (SECOND) OF AGENCY §§ 219-237 (1958) established the existence of a master-servant relationship. To determine whether such a relationship is present, the RESTATEMENT calls for the application of a "control test." *See id.* § 220(1) ("A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control."); *see also Pollack v. Pino's Formal Wear & Tailoring*, 601 A.2d 1190, 1196 (N.J. Super. Ct. App. Div.) ("[T]he relationship of master and servant exists *whenever the employer retains the right to determine not only what shall be done, but how it shall be done.*") (quoting *De Monaco v. Renton*, 113 A.2d 782, 783-84 (N.J. 1955)), *certif. denied*, 611 A.2d 646 (N.J. 1992).

Applying *Lehmann*, the district court concluded that it is "clear . . . that the County of Monmouth does not exercise sufficient control over Prosecutor John Kaye to establish a master-servant relationship. Rather, county prosecutors are controlled by the Attorney General for the State of New Jersey[,] a member of the New Jersey executive branch of government." *Coleman v. Kaye*, No. 91-1140, slip op. at 7 (D.N.J. May 4, 1995). Thus, the court held that "the County of Monmouth cannot be held liable

on a theory of respondeat superior for the actions of Prosecutor John Kaye." *Id.* Since both the district court and the parties consider *Lehmann* to be the seminal case here, we will explore the issue of who can be said to "control" county prosecutors in New Jersey in some detail.

The office of county prosecutor in the State of New Jersey is a constitutionally established office. The New Jersey Constitution provides that

> [c]ounty prosecutors shall be nominated and appointed by the Governor with the advice and consent of the Senate. Their term of office shall be five years, and they shall serve until the appointment and qualification of their respective successors.

N.J. CONST., art. VII, § 2, par. 1. The specific powers and authority of the county prosecutor are fully set forth in Title 2A of the New Jersey Revised Statutes. Each county prosecutor is vested "with the same powers and [is] subject to the same penalties, within his county, as the attorney general shall by law be vested with or subject to. . . . " N.J. STAT. ANN. § 2A:158-5. The county prosecutor's oath of office requires that the appointee swear to faithfully execute the duties of the office "in and for" the county in which he or she has been appointed. *Id.* § 2A:158-3.

County prosecutors in the State of New Jersey are fully and exclusively bestowed with appointment powers as to office staff and personnel. Such appointment powers are delineated by law as follows: Section 2A:158-15 authorizes a county prosecutor to appoint assistant prosecutors; § 2A:157-2 authorizes the county prosecutor to

appoint county detectives; § 2A:158-18.1 empowers the prosecutor to appoint "legal assistants" in counties of the first class; and § 2A:157-10 provides for the appointment of investigators, such as Coleman, who are "to serve at [the county prosecutor's] pleasure. . . . "

Every year the board of chosen freeholders in each county appropriates funds to be used by the prosecutor's office. *Id.* § 40:20-1. Expenses incurred by county prosecutors in carrying out their statutory duty to detect, arrest, indict and convict offenders of the criminal law are paid by the county treasurer. *Id.* § 2A:158-7. The counties' role in financing the local prosecutors' offices is further exemplified by N.J. STAT. ANN. § 2A:158-16, which provides that assistant prosecutors' annual salaries shall "be fixed by resolution of the board of chosen freeholders on the recommendation of the county prosecutor. . . . "

Similar to the county prosecutor, the New Jersey Attorney General is a constitutional officer pursuant to art. V, § 4, ¶ 3 of the New Jersey Constitution. In furtherance of this constitutional authority, the New Jersey Legislature has established the Department of Law and Public Safety in the State's executive branch to be headed by the Attorney General. N.J. STAT. ANN. §§ 52:17B-1-:17B-2. Pursuant to N.J. STAT. ANN. § 52:17A-4, the Attorney General is the State's chief law enforcement officer. Section 52:17B-103 provides that

> [t]he Attorney General shall consult with and advise the several county prosecutors in matters relating to the duties of their office and shall maintain a general supervision over said county prosecutors *with a view to obtaining effective and uniform enforcement of the criminal laws throughout*

> *the State.* He may conduct periodic evaluations of each county prosecutor's office including audits of funds received and disbursed in the office of each county prosecutor.

N.J. STAT. ANN. § 52:17B-103 (emphasis added). It thus appears that although the Attorney General "maintain[s] a general supervision over . . . county prosecutors," the principal concern of that oversight relates to the maintenance of an effective statewide law enforcement policy; i.e., "obtaining effective and uniform enforcement of the criminal laws throughout the State." *Id.*

New Jersey law also empowers the Attorney General to intervene in the criminal matters of a county under certain circumstances. Pursuant to N.J. STAT. ANN. § 52:17B-104, the Attorney General is required to prosecute criminal matters for a county if it has no prosecutor. County prosecutors may also "request in writing the assistance of the Attorney General," but solely for the purpose of a "criminal investigation or proceeding." *Id.* § 52:17B-105. The Attorney General may then "take whatever action he deems necessary to assist the county prosecutor in the discharge of his duties." *Id.*

The New Jersey Legislature has granted the Attorney General the discretionary authority of supersedure of a county prosecutor:

> [w]henever requested in writing by the Governor, the Attorney General shall, and whenever requested in writing by a grand jury or the board of chosen freeholders of a county or the assignment judge of the superior court for the county, the Attorney General may supersede the county prosecutor *for the purpose of prosecuting*

> *all of the criminal business of the State* in said county, intervene in any investigation, criminal action, or proceeding instituted by the county prosecutor, and appear for the State in any court or tribunal for the purpose of conducting such investigations, criminal actions or proceedings as shall be necessary for the protection of the rights and interests of the State.
>
> Whenever the Attorney General shall have superseded a county prosecutor as aforesaid, the county prosecutor, the assistant county prosecutors and other members of the staff of the county prosecutor shall exercise only such powers and perform such duties as are required of them by the Attorney General.

Id. § 52:17B-106 (emphasis added). Thus, the Attorney General's supersedure power appears to have been bestowed with the understanding that it was intended to ensure the proper and efficient handling of the county prosecutors' "criminal business." *Id.* This point is further amplified by the companion law of N.J. STAT. ANN. § 52:17B-107(a), which provides that

> [w]henever in the opinion of the Attorney General the interests of the State will be furthered by so doing, the Attorney General may (1) supersede a county prosecutor in any investigation, criminal action or proceeding, (2) participate in any investigation, criminal action or proceeding, or (3) initiate any investigation, criminal action or proceeding. In such instances, the Attorney General may appear for the State in any court or tribunal for the purpose of conducting such investigations, criminal actions or proceedings as shall be necessary to promote and safeguard the public interests of the State

> and secure the enforcement of the laws of the State.

Id. § 17B-107(a). Noticeably absent in the supersedure language in Title 52 is any reference to an intention on the part of the Legislature to authorize an act of supersedure simply for the purpose of managing routine personnel matters. Such concerns were obviously not a legislative priority.

We recognize that in cases where the Attorney General has taken over the operation of a county prosecutor's office, either in case of supersedure or where a county has no prosecutor, the Attorney General would temporarily have the responsibility to make personnel decisions in the county office. With the exception of that extraordinary situation, which has no application here, the Attorney General does not possess oversight authority with respect to the day-to-day management of the county prosecutor's office. It would be an unwarranted extension of the implications of the Attorney General's supersedure authority to conclude that the mere possibility of its exercise can somehow serve to bring the conduct at issue in the instant case within the purview of the Attorney General's control.

The statutory and constitutional scheme that we have elaborated upon provides county prosecutors in the State of New Jersey with a substantial degree of autonomy from the State government in matters that do not involve the enforcement of the criminal laws of the State. The decision whether to promote an investigator falls within the exclusive province of the county prosector [sic]. We therefore hold that the district court erred in concluding that county

prosecutors in New Jersey are agents of the State Attorney General when they make personnel decisions.

2.

Nor can the County of Monmouth be said to control Prosecutor Kaye's employment decisions. Indeed, attempts by various parties to interfere with county prosecutors' employment prerogatives have been rejected consistently by New Jersey courts. *See Cetrulo v. Byrne*, 157 A.2d 297 (N.J. 1960) (county board of chosen freeholders' appointment of a legal assistant to prosecutor beyond the scope of its powers); *Zamboni v. Stamler*, 489 A.2d 1169 (N.J. Super. Ct. App. Div. 1985) (rejecting Union County detectives' challenge to a reorganization plan that created superior officer positions within the unclassified civil service of the Prosecutor's investigative staff and enabled the Prosecutor to appoint detectives to serve temporarily in that capacity); *cf. Bergen County Bd. of Chosen Freeholders v. Bergen County Prosecutor*, 412 A.2d 130 (N.J. Super. Ct. App. Div. 1980) (upholding decision of the New Jersey Public Employment Relations Commission that the county prosecutor, and not the board of chosen freeholders, is the employer of his subordinates in the county office for purposes of labor relations and collective bargaining).

Moreover, New Jersey courts have held that the county prosecutor enjoys a significant degree of autonomy from the county he or she serves. *See Cetrulo*, 157 A.2d at 301 ("The Legislature as well as the courts have long recognized the strong policy considerations which dictate that since the county prosecutor is charged with

heavy enforcement responsibilities he must be given broad powers to appoint his own personnel."); *Mercer County Bd. of Freeholders v. Mercer County Prosecutor*, 412 A.2d 809, 810 (N.J. Super. Ct. App. Div. 1980) (New Jersey statute that permits the county prosecutor to go to the county's assignment judge for authorization of funding in excess of that approved by the county freeholders "indicates a legislative intent to place the prosecutor in a dominant position with relation to the freeholders for the purpose of maintaining his integrity and effectiveness"); *Ruvoldt v. Clark*, 499 A.2d 247, 250 (N.J. Super. Ct. Law Div. 1983) (holding that the county has no control over a Prosecutor's nonsalary expenditures that do not exceed his budget because "it would be incongruous to permit county government to control the operations and functions of the Prosecutor, a constitutional officer entrusted with awesome duties of 'vast importance to the public' ").

Both the County of Monmouth and the New Jersey State Attorney General's Office, which filed an *amicus* brief, make convincing arguments that under the existing New Jersey constitutional and statutory scheme, neither the Attorney General nor the County of Monmouth can truly be said to "control" the personnel decisions of Prosecutor Kaye. Therefore, if *Lehmann* provides the appropriate test, we would have to conclude that no governmental entity in the State of New Jersey can under any circumstances be held accountable for a county prosecutor's acts of intentional discrimination, no matter how flagrant and persistent the violations are, because county prosecutors are neither state nor county officials. We do not believe that the New Jersey Supreme Court would countenance such an untoward result.

The New Jersey Legislature and the New Jersey Supreme Court have expressed a persistent and strong commitment to eradicating discrimination in the workplace. *See Lehmann*, 626 A.2d at 454 ("The purpose of the LAD is to eradicate discrimination, whether intentional or unintentional."); *Grigoletti v. Ortho Pharmaceutical Corp.*, 570 A.2d 903, 911 (N.J. 1990) ("[T]he LAD represents a strong commitment to counteract discrimination attributable to sex or gender, an evil that is felt acutely in terms of employment and economic treatment."); *Fuchilla v. Layman*, 537 A.2d 652, 660 (N.J.) (citing New Jersey's "clear public policy . . . to abolish discrimination in the work place"), *cert. denied*, 488 U.S. 826, 109 S. Ct. 75 (1988); *Peper v. Princeton Univ. Bd. of Trustees*, 389 A.2d 465, 478 (N.J. 1978) (noting the "repugnant" nature of sex discrimination and that "New Jersey has always been in the vanguard in the fight to eradicate the cancer of unlawful discrimination of all types from our society").

The New Jersey Supreme Court has further stated that the LAD, "as remedial social legislation, . . . is deserving of a liberal construction." *Clowes v. Terminix Int'l, Inc.*, 538 A.2d 794, 802 (N.J. 1988). The supreme court views "the issue of the scope of an employer's liability for compensatory and punitive damages" under the LAD to be "a question of public policy," in which the most critical underlying consideration is "which position provides the most effective intervention and prevention of employment discrimination." *Lehmann*, 626 A.2d at 465.

The extension of *Lehmann*'s agency principles to Coleman's sex discrimination suit against the County of

Monmouth is logically unacceptable because county prosecutors are clearly government officials who, reason dictates, must be acting on behalf of some governmental entity when they make personnel decisions. The agency paradigm fails here because it would require us to reach the specious conclusion that Prosecutor Kaye was not acting under the authority of any state governmental body, either state or county, when he passed Coleman over for promotion. We must therefore look to New Jersey constitutional, statutory and decisional law to determine which level of state government the county prosecutor "belongs" when making personnel decisions.

3.

Our review of New Jersey Supreme Court decisions that have discussed the relation of the county prosecutor to the State Attorney General is both instructive and supportive of our conclusion that county prosecutors are acting as county officials when they make employment decisions. The issue of the county prosecutor's role in relation to the Attorney General was discussed in great detail in *Morss v. Forbes*, 132 A.2d 1 (N.J. 1957). The question presented in *Morss* was whether the New Jersey Legislature had the authority to compel a county prosecutor to disclose certain information and records relating to wiretapping activities authorized by his office. Morss, the Union County Prosecutor, resisted these demands, arguing that by compelling "the disclosure of information which the prosecutor has deemed to be confidential, the [Legislative] Committee is transgressing upon the doctrine of separation of powers and actually invading the exclusive province of a coordinate body." *Id.* at 11.

The New Jersey Supreme Court rejected this argument, holding that the county prosecutor could be required to turn the wiretap information over to the state legislature. In reaching this conclusion, the court analyzed the question of "the role . . . the [county] prosecutor plays in the governmental structure." *Id.* at 14. In so doing, the *Morss* court described the role of the State Attorney General and county prosecutors in relation to each other within the framework established by the New Jersey Constitution:

> By provision of the Constitution of 1947, both the attorney general and the county prosecutor are constitutional officers. Both are appointed by the Governor with the advice and consent of the Senate. The attorney general serves a term coexistent in length with that of the Governor, but the county prosecutor serves for five years, or until the appointment and qualification of a successor. The attorney general, as head of the Department of Law and Public Safety, is within the executive department (Art. V, § IV, par. 3), but the provision for the appointment of prosecutors is found in Art. VII, § II, par. 1, 'Public Officers and Employees.'

Id. at 16-17. The supreme court concluded that "[t]hese constitutional provisions fail to furnish any guide or standard with respect to the nature of powers, rights, duties and responsibilities of either officer, and, consequently, the task of definition is left to the Legislature." *Id.* at 17.

Reviewing the applicable statutes that govern the relationship between the county prosecutor and the state

government, the *Morss* court noted that despite the Attorney General's statutory power of supersession, "the presently existing situation under the Constitution of 1947 . . . strongly reaffirms that the [county] prosecutors are largely independent of control by the attorney general. . . . " *Id.* at 16. The court noted the demonstrable lack of a "chain of command between the attorney general and the county prosecutors." *Id.* at 17. Evaluating the powers and responsibilities of the Attorney General and the county prosecutors within their respective governmental spheres led the court to recognize "the essential independence of the two offices and the disparateness of their powers." *Id.*

The *Morss* court expressed serious reservations as to whether the New Jersey statutory scheme "imports a close supervisory relationship between the attorney general and the county prosecutors." *Id.* Nor did "it appear that the Governor is responsible for the daily functioning of the prosecutor's office." *Id.* at 18. The court also attached significance to the fact that county prosecutors "receive their remuneration from the county." *Id.*

Although the *Morss* court paid due regard to the governor's power to supersede the county prosecutor's authority, it ultimately concluded that "the existence of this power of supersession does not bring the prosecutors so directly under the influence of the Governor that they automatically qualify as full-fledged members of the state executive branch." *Id.* Summing up on its lengthy discussion on this issue, the supreme court concluded that

> although there is confusion and uncertainty with regard to [the county prosecutor's] status by reason of the fact that his office is created by

> the Constitution, he is appointed by the Governor with the advice and consent of the Senate, the Legislature prescribes his duties, while he is paid by the county, . . . there is nevertheless little doubt but that the executive chain of command is not sufficiently prominent to enable the prosecutor to claim any high prerogative which might be enjoyed by the state executive with respect to withholding information from the Legislature. . . . *The prosecutor is primarily a local official.*

Id. at 18-19 (emphasis added). The *Morss* court's pronouncement on the locus of the county prosecutor's authority supports our conclusion that county prosecutors act as county officials when they make personnel decisions. *Morss* implies that absent direct intervention by the State, county prosecutors act as county officials when they are called upon to make administrative decisions on a local level.

One of the authorities upon which the district court relied in concluding that Prosecutor Kaye had acted as a state official when he decided not to promote Coleman was Justice Pashman's partial concurrence and dissent in *In re Ringwood Fact Finding Committee,* 324 A.2d 1, 5-15 (N.J. 1974) (Pashman, J., concurring in part and dissenting in part). In *Ringwood,* Justice Pashman declared that "[t]his State has always recognized the prosecutor's primacy as a representative of the executive branch." *Id.* at 8. Justice Pashman also attempted to limit the scope of *Morss* by citing the alleged implications of the New Jersey Legislature's enactment of the Criminal Justice Act of 1970. As explained by Justice Pashman, this state statute had "consolidated many previous statutes dealing with

the attorney general's and prosecutor's authority in an attempt to encourage more cooperation and coordination among law enforcement authorities in combating organized crime." *Id.* at 10. Justice Pashman opined that this development had "altered the relationship of county prosecutors to the executive branch" and thereby "render[ed] inapplicable much of the discussion [in *Morss*]." *Id.* at 11.

Justice Pashman's opinion in *Ringwood* provides no significant support for the proposition that county prosecutors in New Jersey always act as state officials irrespective of the duties that they are called upon to perform. In addition to not speaking for the majority of the court, Justice Pashman confined his discussion to the classic law enforcement functions of the prosecutor's office, as opposed to the day-to-day personnel decisions that are at issue in the instant case. The fact that the prosecutor "[i]n his county . . . is the foremost representative of the executive branch of government *in the enforcement of the criminal law*" is not disputed here. *State v. Winne*, 96 A.2d 63, 72 (N.J. 1953) (emphasis added). What we must address is the county prosecutor's role in the promotion process on the local level, an issue separate and apart from the prosecutor's well-recognized executive investigatory and prosecutorial functions.

The New Jersey Supreme Court revisited the relation of the county prosecutor to the executive branch of state government in *Cashen v. Spann*, 334 A.2d 8 (N.J.), *cert. denied*, 423 U.S. 829, 96 S. Ct. 48 (1975). *Cashen* involved a search of a private residence based upon a search warrant affidavit that admittedly was "grossly erroneous in significant respects." *Id.* at 10. The question presented was

whether the Morris County Prosecutor and the detectives who prepared the affidavit, who were defendants in this action, were acting as agents of the State when their allegedly tortious conduct had arisen out of the investigation of criminal activity. The *Cashen* court held that "in the context of this case, the prosecutor and the detectives are to be considered as agents of the State and not the county." *Id.* at 14.

The *Cashen* court gave no indication of limiting or otherwise distinguishing the court's previous decision in *Morss*, which had recognized the county prosecutor's broad discretion in performing local administrative functions and great degree of independence from the State government in many respects. As such, the supreme court was careful to ensure that its holding would not be read too broadly:

> We wish to make it clear . . . that our resolution of this issue is limited to the factual circumstances here presented. We find it appropriate to regard the defendant officials as State agents where the alleged tortious conduct arose out of the investigation of criminal activity, but we express no opinion on the question of whether the prosecutor or his detectives can be considered State or county employees for other purposes. We also leave for another day the question of whether a county may be held vicariously liable for the conduct of a prosecutor or his detectives in other circumstances.

Id. (citation omitted). The issue that the *Cashen* court reserved on is before this court today.

In *Dunne v. Fireman's Fund American Insurance Co.*, 353 A.2d 508 (N.J. 1976), the New Jersey Supreme Court held that county detectives whose duties consisted of performing services exclusively for the prosecutor were "employees of the county" within the meaning of an insurance policy affording coverage to county employees acting within the scope of their duties. Applying reasoning that could apply equally in the prosecutorial setting, the court noted that "in preparing and executing the affidavit upon which the search warrant was based and conducting the search, [the investigators] were 'agents of the State.' At the same time they were also employees of and there existed an employer-employee relationship with the County." *Id.* at 512.

The *Dunne* court stated that "[c]ounty prosecutors' detectives possess a hybrid status." *Id.* at 511. Our review of New Jersey law has convinced us that the same can be said about county prosecutors. When county prosecutors engage in classic law enforcement and investigative functions, they act as officers of the State. But where, as here, the county prosecutor decides whether an employee at his or her office is worthy of an open promotion, the county prosecutor is performing an administrative function on the local level entirely unrelated to the duties involved in criminal prosecution. We therefore conclude that Prosecutor Kaye was acting as a local, county official when he denied Coleman's applications for promotion.

Prosecutor Kaye's constitutional and statutory authority went far beyond that of a typical supervisory employee. Kaye possessed final policymaking authority under state law to manage the internal affairs of his

office. The New Jersey LAD is intended to redress intentional discrimination, *Goodman v. London Metals Exch., Inc.*, 429 A.2d 341, 347 (N.J. 1981), and it is uncontroverted that the jury verdict against the County of Monmouth was supported by multiple findings of intentional discrimination. We hold, therefore, that the discriminatory acts of Kaye and his subordinates may be imputed to the County of Monmouth since Kaye was the final policymaking authority acting on behalf of Monmouth County in the prosecutor's office. We therefore conclude that the compensatory and punitive damages awards levied against the County of Monmouth should not have been vacated on either of the grounds upon which the district court relied.

IV.

Having rejected the two grounds upon which the district court vacated the jury verdict against the County of Monmouth, we now address the merits of the other claims asserted by the parties to this action. Although Coleman's complaint stated claims against the County of Monmouth and Prosecutor Kaye under 42 U.S.C. § 1983, New Jersey LAD and Title VII, the verdict sheets issued to the jury provided no space for the jury to indicate which causes of action formed the basis of the defendants' liability. Furthermore, for reasons that are not clear from the record, the jury was not instructed on all of the claims that were asserted in Coleman's complaint. No objections, however, were raised by any of the parties as to the content of the instructions, despite the district court's apparent decision not to instruct the jury on the elements of a number of the claims set forth in Coleman's

complaint. With these considerations in mind, we will now address the other issues that must be resolved in this case.

A.

The County of Monmouth relies upon the conclusions of the district court as to the service of process issue and the county prosecutor's status vis-a-vis the Attorney General in support of its argument that the issue of compensatory damages should not have been submitted to the jury. We have already rejected the merits of these claims and need not address them again. We therefore conclude that the compensatory damages award of $15,000 imposed on the County of Monmouth must be reinstated.

An overwhelming portion of the damages award that the jury assessed against the County of Monmouth ($350,000 out of a total of $365,000) was allocated to punitive damages. As § 1983 plaintiffs may not obtain punitive damages against a county defendant, *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 101 S. Ct. 2748 (1981), the jury must have found implicitly that the County, through Kaye, had violated the New Jersey LAD.[4] The jury's findings that Prosecutor Kaye and/or his subordinates intentionally discriminated against Coleman on three occasions provides a sufficient foundation

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[4] The County of Monmouth has not challenged the propriety of an award of punitive damages against a county defendant under the 1990 amendments to the New Jersey LAD. As such, we do not address this issue.

to support a jury award of punitive damages against the County of Monmouth. We therefore conclude that the jury award of punitive damages against Monmouth County must also be reinstated.

B.

The jury found that Prosecutor Kaye intentionally discriminated against Coleman by not promoting her to sergeant in both June of 1990 and October of 1990. Based upon these findings, the jury awarded Coleman $10,000 in compensatory damages for the "pain, suffering, humiliation and mental anguish" she endured as a result of Kaye's actions. App. at 396. The jury also awarded Coleman an additional $50,000 in punitive damages against Kaye. $15,000 of this award was premised on the first act of intentional discrimination in June of 1990. An additional $35,000 was assessed for the second incident in October of 1990.

As to the various civil rights claims that Coleman asserted in her complaint against Prosecutor Kaye, the district court instructed the jury, without objection, only upon what it would be required to find in order to hold Kaye liable for compensatory and punitive damages under 42 U.S.C. § 1983. Accordingly, we will analyze Prosecutor Kaye's arguments under controlling § 1983 case law. We conclude that the jury's finding that Prosecutor Kaye intentionally discriminated against Coleman on two occasions is supported by the record and provides ample justification for its award of compensatory and punitive damages against Kaye under § 1983.

Prosecutor Kaye challenges the jury award of compensatory and punitive damages on the following grounds. First, Kaye argues that his Rule 50(b) motion for judgment as a matter of law should have been granted by the district court because no "actual injury" occurred here and that § 1983 does not permit plaintiffs to recover compensatory damages for the type of harm that Coleman is alleged to have suffered. Second, Kaye argues there is insufficient evidence on this record to support a jury finding that he discriminated against Coleman. Kaye also makes the related contention that the record is critically deficient of evidence to support an award of either compensatory or punitive damages against Kaye in his individual capacity. We will address these issues *seriatim*.

Prosecutor Kaye argues that Supreme Court's decision in *Carey v. Piphus*, 435 U.S. 247, 98 S. Ct. 1042 (1978), precludes an award of compensatory damages for the personal humiliation and mental anguish Coleman is alleged to have endured as a consequence of Kaye's acts of intentional discrimination. The Supreme Court's decision in *Memphis Community School District v. Stachura*, 477 U.S. 299, 106 S. Ct. 2537 (1986), however, holds otherwise. The *Stachura* Court expressly held that "compensatory damages may include not only out-of-pocket loss and other monetary harms, but also such injuries as 'impairment of reputation . . . , personal humiliation, and mental anguish and suffering.' " *Id.* at 306, 106 S. Ct. at 2543 (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350, 94 S. Ct. 2997, 3012 (1974)). We reject Kaye's argument that Coleman did not suffer an "actual injury" because a reasonable jury could credit Coleman's testimony as to

the personal anguish she suffered as a result of being passed over for promotion.

Prosecutor Kaye's evidentiary insufficiency argument is similarly without merit. The gist of Kaye's argument is that he cannot be held personally liable for intentional discrimination because he merely rubber stamped the suggestions of his subordinates and had no awareness of the problems that Coleman was facing. We find ample evidence in the record to reject this argument. A reasonable jury could conclude that Kaye, despite his awareness of Coleman's qualifications and the serious allegations of sex discrimination that she had raised, nonetheless chose to exercise his final policymaking authority in employment matters in a legally impermissible manner.

After Coleman was denied a promotion in May of 1989, she suspected that she had been discriminated against and initially sought redress from her superiors in the Monmouth County Prosecutor's Office. After her May 1989 rejection, Coleman prepared a memorandum to Prosecutor Kaye, dated May 24, 1989, which alluded to her suspicions that she had not been promoted because of her sex. Coleman felt aggrieved because she perceived that "men with less experience and seniority were considered and promoted." App. at 513. In her May 24, 1989 memorandum to Prosecutor Kaye, Coleman wrote that

> [t]hroughout my entire career of over sixteen years in Law Enforcement, I have never believed that a person should be promoted based upon race, sex, creed or national origin. However, the recent promotion of fourteen men, four with less time in the Prosecutor's Office and one who you passed over nineteen people

> to promote in my field of training and expertise, has prompted me to ask the following question:
>
> > What exactly have I done, or not done, to warrant being passed over or not even considered for promotion?[5]

Id. at 514. Coleman hand delivered this memorandum to Chief of Investigations Frank R. Licitra, who later informed Coleman that he had personally submitted it to Kaye. Prosecutor Kaye never replied to Coleman's inquiry.

Coleman sent Kaye a follow-up memorandum, dated November 6, 1989, concerning her failure to be promoted in May of 1989. In the November 6, 1989 memorandum, Coleman asked Kaye to "[p]lease advise [her] what steps [he] intend[ed] to take to remedy this discrimination." *Id.* at 513. Once again, Kaye did not respond. Moreover, there is no indication in the record that Coleman's allegations of discrimination were ever investigated.

Prosecutor Kaye can be held liable under § 1983 if he had actual knowledge of discriminatory conduct and acquiesced in it. As we explained in *Rode v. Dellarciprete*, 845 F.2d 1195, 1207 (3d Cir. 1988), "[p]ersonal involvement can be shown through allegations . . . of actual knowledge and acquiescence." Since Coleman had presented her concerns to Kaye in writing about the discriminatory treatment that she was enduring, and Kaye chose

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[5] Coleman testified that when she asked Chief Licitra about why she had not been promoted in May of 1989, Licitra told her that "it is even worse than that, you weren't even considered." App. at 488.

to take no action whatsoever, the pattern of discriminatory conduct that Coleman alleges took place at the Monmouth County Prosecutor's Office at this time takes on added significance. Coleman presented evidence at trial that called into question the manner in which she had been evaluated in comparison to her male counterparts, who had also applied for promotions on the occasions in question. For example, Chief Licitra prepared Coleman's performance evaluation for the period of November 1, 1988 through April 30, 1989. Although Coleman was rated as "outstanding" in five of six categories,[6] and was also given a "plus" or "strong" rating in twenty-nine of thirty-one subcategories, she received an overall rating of only "competent." App. at 521. Specifically, in the category of "Investigative Ability," Coleman received four pluses (signifying a strength) and two checks (indicating standard performance). This was the only category of the six evaluated in which Coleman received a "competent" rating.

By way of contrast, Michael Campbell, an investigator who was ultimately selected for promotion over Coleman, rated "outstanding" in only one of the six categories evaluated, that of "Investigative Ability." Although Campbell was also given an overall rating of "competent," he received an evaluation of "outstanding" in investigative ability, despite the fact that he had been rated as "strong" in only two of the six subcategories that

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[6] The six categories evaluated were quantity of work, quality of work, work habits, investigative ability, personal traits and "other."

are considered under this heading. *Id.* at 522. Furthermore, in stark contrast to Coleman, Campbell received a "plus" or "strong" rating in only three of the thirty-one subcategories upon which candidates for promotion were evaluated.

Coleman also introduced evidence at trial that procedures utilized by the Monmouth County Prosecutor's Office to evaluate candidates for promotion were altered in a manner that seriously hindered her efforts to obtain a promotion. Coleman alleges that General Order 90-3, promulgated on April 19, 1990, was intended to provide a pretextual justification for the denial of future promotions. Order 90-3 established as a promotion criterion the length of time served in a specific unit, as opposed to seniority as an investigator, which had been a promotion criterion under the previous system. This new evaluation process had the effect of giving less-experienced male investigators a seniority advantage over Coleman when promotion decisions were to be made.

The jury found Coleman's testimony to be credible and her arguments to be convincing. Since Coleman presented her concerns to Prosecutor Kaye via memoranda on two occasions and received no response, a reasonable jury could properly reject Kaye's arguments that he had no actual knowledge and was not involved in the discrimination that occurred. Viewing this "evidence in the light most favorable to [Coleman] and giving [her] the advantage of every fair and reasonable inference," *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1166 (3d Cir. 1993), we conclude that there is sufficient evidence in this record to support the jury's finding of liability against Prosecutor Kaye in his individual capacity.

Prosecutor Kaye also alleges that there was no legally sufficient basis from which a jury could award punitive damages. The jury found that Kaye had intentionally discriminated against Coleman on two occasions. On the verdict sheet, the jury assessed $15,000 in punitive damages for the first violation in June of 1990 and $35,000 for the second violation in October of 1990. We conclude that the jury's finding of two acts of intentional discrimination, after having been put on notice of a prior act of discrimination against the same plaintiff, evinces the requisite "reckless or callous indifference" to Coleman's federally protected rights. *Smith v. Wade*, 461 U.S. 30, 56, 103 S. Ct. 1625, 1640 (1983). We will therefore uphold the jury's imposition of a $50,000 punitive damages award against Prosecutor Kaye in his individual capacity.

V.

Having prevailed on her § 1983 claim against Prosecutor Kaye, Coleman is entitled to an award of reasonable attorneys' fees under 42 U.S.C. § 1988. On September 8, 1995, the district court issued a memorandum opinion discussing the attorneys' fees issue. *Coleman v. Kaye*, No. 91-1140 (D.N.J. Sept. 8, 1995). Since by that time the district court had dismissed the County of Monmouth as a party to this action, Prosecutor Kaye was required to pay the entire fee award. After reviewing Coleman's attorneys' fee application, the district court reduced substantially the hourly rates that Coleman's attorneys had sought, noting that "[t]hroughout the entire adjudication of this matter, this Court has had a significant opportunity to assess the skills and experience of the attorneys involved. As a result, this Court will reduce plaintiff's

counsels' hourly rates to 'rates prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.' " *Id.* at 5 (quoting *Rode v. Dellarciprete*, 892 F.2d 1177, 1183 (3d Cir. 1990)).[7] The district court ordered that Prosecutor Kaye would be liable to pay Coleman $101,184 in attorneys' fees, in addition to $3,968.92 in costs. Coleman argues that the district court abused its discretion when it reduced the hourly rates sought by her attorneys, based upon its conclusory observation as to "the skills and experience of the attorneys involved." *Coleman*, No. 91-1140, slip op. at 5. We agree.

A.

As we explained in *Silberman v. Bogle*, 683 F.2d 62, 65 (3d Cir. 1982), our standard of review in this context "is a narrow one. We can find an abuse of discretion if no reasonable man would adopt the district court's view." The district court's discretion, however, is not without bounds. We have held that a district court may not set attorneys' fees based upon a generalized sense of what is customary or proper, but rather must rely upon the record. *Cunningham v. City of McKeesport*, 807 F.2d 49,

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[7] Coleman's lead counsel, Linda Kenney, had sought to be compensated at a rate of $300 per hour. The district court reduced this amount to $175 per hour. The hourly fees sought by Ms. Kenney's associates ranged from $190 to $250. The district court adjusted this figure to a flat rate of $100 per hour. Coleman's counsel also sought between $80 to $90 per hour for paralegal services. The district court reduced this figure to $40 per hour. *Coleman v. Kaye*, No. 91-1140, slip op. at 4-5 (D.N.J. Sept. 8, 1995).

52-53 (3d Cir. 1986), *cert. denied*, 481 U.S. 1049, 107 S. Ct. 2179 (1987). It is this requirement that the district court failed to satisfy.

As the Supreme Court explained in *Blum v. Stenson*, 465 U.S. 886, 895, 104 S. Ct. 1541, 1547 (1984), "[t]he statute and legislative history establish that 'reasonable fees' under § 1988 are to be calculated according to the prevailing market rates in the relevant community. . . . " *See Student Pub. Interest Research Group of New Jersey, Inc. v. AT & T Bell Labs.*, 842 F.2d 1436, 1442 (3d Cir. 1988) ("Market rates have served as the prime focus of our inquiry in ascertaining reasonable attorneys' fees."). Although Coleman's attorneys submitted affidavits in support of their assessment of the prevailing market rate, the district court did not address this evidence. The record is not clear whether any affidavits were filed in opposition to the hourly rates claimed by Coleman's attorneys. In fact, the district court failed to cite any record evidence in support of its conclusion that the fees requested by Coleman's attorneys were unreasonable.

The number of hours that Coleman's attorneys reasonably expended in litigating this matter is not in dispute. On this record, however, "the findings of the district court purporting to justify a reduction in the fee request are not specific and lack the evidentiary basis to counter the . . . affidavit of plaintiff's counsel detailing the[ir] . . . billing rate[s]." *Cunningham*, 807 F.2d at 52. We therefore hold that if the hourly rates are contested, the district court on remand must conduct a hearing in order to calculate reasonable hourly rates "according to the prevailing market rates in the relevant community." *Rode*, 892 F.2d at 1183. We express no opinion as to whether the

hourly rates sought by Coleman's attorneys are reasonable, in the absence of a more fully developed record.

B.

Prosecutor Kaye argues that he alone should not have been required to pay the entire amount of the prevailing party's attorneys' fees and costs incurred in this matter. We agree. As we have held that the jury verdict against the County of Monmouth is to be reinstated, Prosecutor Kaye should not have been ordered to pay the entire amount of the lodestar figure plus costs. It is a well-established principle that when multiple defendants are held to be liable in a civil rights action, the proper course of action for a district court is to allocate responsibility for the payment of fees among the responsible parties. *See, e.g., Vargas v. Hudson County Bd. of Elections,* 949 F.2d 665, 677 (3d Cir. 1992). Under this analysis, "each defendant must bear the prevailing plaintiff's fees for time spent on matters clearly related to the claims made against that defendant." *Williamsburg Fair Hous. Committee v. Ross-Rodney Hous. Corp.,* 599 F. Supp. 509, 514 (S.D.N.Y. 1984). On remand, the district court must apportion the hours that it has found to have been reasonably spent by Coleman's attorneys on this case between the claims asserted against Prosecutor Kaye and those against the County of Monmouth.

A further complication must also be resolved. Our discussion of the counsel fees claim asserted against Prosecutor Kaye focused exclusively upon his responsibility to pay reasonable attorneys' fees under 42 U.S.C. § 1988. This analysis was appropriate because, as to defendant

Kaye, Coleman's § 1983 claim was the only theory of liability upon which the jury was instructed. The County of Monmouth, however, was found to have violated the New Jersey LAD. Coleman argues that the district court erred in not awarding a contingency fee enhancement under the attorneys' fees provision of the LAD. To evaluate this claim, we must review how the counsel fees provision of LAD has been interpreted by the New Jersey Supreme Court.

The New Jersey approach to the issue of contingency enhancement under the LAD is a marked departure from the Supreme Court's interpretation and application of federal fee-shifting statutes. The New Jersey Supreme Court's decision *Rendine v. Pantzer,* 661 A.2d 1202 (N.J. 1995), addressed in a thorough and comprehensive manner the issue of the propriety of contingency enhancements under the fee-shifting provisions of the LAD. *See* N.J. STAT. ANN. § 10:5-27.1. The *Rendine* court elected to depart from Supreme Court precedent on this issue and thereby established a rule that strongly favors the award of contingency enhancements to prevailing parties under the LAD.

In *City of Burlington v. Dague,* 505 U.S. 557, 112 S. Ct. 2638 (1992), the Supreme Court was called upon to interpret the attorneys' fees provisions of the Solid Waste Disposal Act, 42 U.S.C. § 6972(e), and the Federal Water Pollution Control Act, 33 U.S.C. § 1365(d). Both these statutes contain language that is comparable to that of 42 U.S.C. § 1988. *See* 505 U.S. at 562, 112 S. Ct. at 2641. The Court rejected the prevailing parties' argument that they were entitled to a contingency enhancement, holding that

such relief "is not permitted under the fee-shifting statutes at issue." *Id.* at 567, 112 S. Ct. at 2643-44.

The New Jersey Supreme Court in *Rendine* expressly rejected the reasoning and analysis of the *Dague* majority, holding that "a counsel fee awarded under a fee-shifting statute cannot be 'reasonable' unless the lodestar, calculated as if the attorney's compensation were guaranteed irrespective of result, is adjusted to reflect the actual risk that the attorney will not receive payment if the suit does not succeed." 661 A.2d at 1228. The *Rendine* court opined "that contingency enhancements in fee-shifting cases ordinarily should range between five and fifty-percent of the lodestar fee, with the enhancement in typical contingency cases ranging between twenty and thirty-five percent of the lodestar." *Id.* at 1231. Thus, the district court on remand must also determine the appropriate degree of contingency enhancement that the County of Monmouth will be required to pay under the principles set forth in *Rendine*.

VI.

Coleman's final claim is that she, as a prevailing tort plaintiff under New Jersey law, is entitled to an award of prejudgment interest under the New Jersey Court Rules. Specifically, N.J. Ct. R. 4:42-11(b) provides in relevant part that:

> *Except where provided by statute with respect to a public entity or employee,* and except as otherwise provided by law, the court shall, in tort actions, . . . include in the judgment simple interest, calculated as hereafter provided, from the date of the institution of the action or from a

> date 6 months after the date the cause of action arises, whichever is later, provided that in exceptional cases the court may suspend the running of such prejudgment interest. . . .

Id. (emphasis added). Awards of prejudgment interest, when appropriate, apply only to awards of compensatory damages. *See Belinski v. Goodman*, 354 A.2d 92, 96 (N.J.Super. Ct. App. Div. 1976).

We reject Coleman's claim of entitlement to prejudgment interest against either Prosecutor Kaye or the County of Monmouth. As to Prosecutor Kaye, the jury's instructions were limited to Coleman's federal civil rights claim under 42 U.S.C. § 1983. As such, Kaye could only have been held to be liable under federal law. Therefore, prejudgment interest cannot be awarded against Prosecutor Kaye under New Jersey Law.

Nor can prejudgment interest be assessed against the County of Monmouth. The court rule that Coleman invokes expressly provides that prejudgment interest will not be awarded against a public entity "[e]xcept where provided by statute. . . . " N.J. Ct. R. 4:42-11(b). There is no statutory authorization in New Jersey for such an award. To the contrary, as the New Jersey Appellate Division stated in *Maynard v. Mine Hill Township*, 582 A.2d 315, 318 (N.J.Super. Ct. App. Div. 1990), the New Jersey Tort Claims Act "specifically prohibits prejudgment interest against government tortfeasors." *See* N.J. Stat. Ann. § 59:9-2(a) ("No interest shall accrue prior to the entry of judgment against a public entity or public employee.").

VII.

We will affirm the order of the district court to the extent that it denied Prosecutor Kaye's motion for a judgment as a matter of law. We will reverse the order of the district court vacating the jury verdict against the County of Monmouth and order the judgment entered against the County be reinstated. If on remand the defendants elect to challenge the hourly rates put forth by Coleman's attorneys, a hearing must be held to determine a reasonable hourly rate for their services. Once the lodestar is calculated, responsibility for paying the attorneys' fees award is to be allocated among the defendants on a percentage basis. After the responsibility for the payment of attorneys' fees has been properly apportioned, the district court must also consider the appropriate degree of contingency enhancement to apply to the County of Monmouth's portion of the fee award under New Jersey law.

Costs taxed to the County Prosecutor's Office of the County of Monmouth and John Kaye.

A True Copy:
Teste:

Clerk of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 95-5439/5469/5708/5742

BARBARA COLEMAN,
Appellant Nos. 95-5439/5742

v.

JOHN KAYE, Individually, and
in his capacity as Monmouth County
Prosecutor; COUNTY PROSECUTOR'S OFFICE OF
THE COUNTY OF MONMOUTH; JOHN DOES, 1-100;
JANE DOES, 1-100

COUNTY OF MONMOUTH,
Intervenor in D.C.

BARBARA COLEMAN

v.

JOHN KAYE, Individually, and
in his capacity as Monmouth County
Prosecutor; THE COUNTY PROSECUTOR'S
OFFICE OF THE COUNTY OF MONMOUTH;
JOHN DOES, 1-100; JANE DOES, 1-100

COUNTY OF MONMOUTH
Intervenor in C.C.

John Kaye,
Appellant Nos. 95-5469/5708

On Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 91-cv-01140)

Present: Cowen and Roth, *Circuit Judges*, Cindrich, *District Judge**

JUDGMENT

These causes came on to be heard on the record from the United States District Court for the District of New Jersey and were argued by counsel April 29, 1996.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered June 20, 1995, be, and the same is hereby affirmed in part and reversed in part and the cause is remanded to the District Court with instructions consistent with the opinion of this Court. Costs taxed against the County Prosecutor's Officer of the County of Monmouth and John Kaye. All of the above in accordance with the opinion of this Court.

ATTEST:

/S/ P. Douglas Sirle
Clerk

Dated: June 26, 1996

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* Honorable Robert J. Cindrich, United States District Judge for the Western District of Pennslvania, sitting by designation.

Costs taxed in favor of Appellant a follows:

Total for brief . . . $1665.33
Total . . . $1665.33

Certified as a true copy and issued in lieu of a formal mandate on August 14, 1996

Teste: Calfra Balkee
Chief Deputy Clerk, United States Court of Appeals for the Third Circuit

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

BARBARA COLEMAN, Plaintiff, v. JOHN KAYE et al., Defendants.	:	Civ. No. 91-1140 (GEB) MEMORANDUM OPINION (Filed May 4, 1995)

BROWN, District Judge

This matter comes before the Court on the County of Monmouth's motion to intervene and vacate the verdict and defendant, John Kaye's motion for judgment as a matter of law, or in the alternative, for a new trial and/or to alter or amend the judgment below. For the reasons set forth in this Memorandum Opinion, this Court will grant the County of Monmouth's motion to intervene and vacate the judgment. Moreover, the Court will deny defendant Kaye's motions.

I. BACKGROUND

In the present action, plaintiff Barbara Coleman sued defendants John Kaye and the County Prosecutor's Office of the County of Monmouth alleging that they discriminated against her based on gender. Following a seven-day trial, the jury deliberated and found that: (1) Prosecutor John Kaye intentionally discriminated against plaintiff based upon gender by not promoting her to sergeant in

June 1990 and October 1990; (2) the County of Monmouth did not adopt a policy or custom of sexual discrimination that resulted in plaintiff not being promoted in May 1989, June 1990 and October 1990; (3) Prosecutor John Kaye "and/or one or more of his subordinates who made recommendations to him intentionally discriminated against plaintiff because she was a woman, which discrimination proximately caused her non-promotion" in May 1989, June 1990 and October 1990; (4) Prosecutor John Kaye and/or one or more of his subordinates did not intentionally retaliate against plaintiff because she filed an EEOC complaint. *See* Verdict Sheet. Specifically, the jury found that Prosecutor John Kaye intentionally discriminated against plaintiff based upon gender by not promoting her to Sergeant in June 1990 and again in October 1990. *See* Second Verdict Sheet. Moreover, the jury found "Prosecutor Kaye and/or one or more of his subordinates who made recommendations to him intentionally discriminate[d] against plaintiff because she was a woman, which discrimination proximately caused her non-promotion to Sergeant" in May 1989, June 1990 and October 1990. *Id.*

As a result, the jury awarded plaintiff Coleman $15,000 against the County of Monmouth for compensatory damages and $350,000 against the County of Monmouth for punitive damages. *See* Verdict Sheet on Damages. In regards to defendant Kaye, the jury awarded plaintiff $10,000 in compensatory damages and $50,000 in punitive damages; $15,000 attributable to the June 1990 incident and $35,000 attributable to the October 1990 incident. *Id.*

II. DISCUSSION

A. County of Monmouth's Motion to Intervene and Vacate the Verdict

In the present controversy, the County of Monmouth moves to intervene and vacate the $365,000.00 verdict entered against it. Fed. R. Civ. P. 24 provides in pertinent part that

> . . . anyone shall be permitted to intervene in an action . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest . . .

Id. Because the County of Monmouth asserts that it was never a party to the action, and because a verdict in the amount of $365,000.00 was entered against it, the County of Monmouth clearly has an interest in the subject matter of this action. Thus, this Court will grant the County of Monmouth's motion to intervene pursuant to Fed. R. Civ. P. 24.

The County of Monmouth has also made a motion to vacate the $365,000.00 verdict pursuant to Fed. R. Civ. P. 60(b)(4) which provides that on motion the court can relieve a party from a final judgment if such judgment is void. *Id.* It is the County of Monmouth's position that because it was never a party to the action, the $365,000.00 judgment is void. Thus, this Court must determine whether the County of Monmouth was a party to the above-captioned action.

Pursuant to FED. R. CIV. P. 3, civil actions are commenced upon the filing of a complaint. *Id.* Along with filing the complaint, the plaintiff is required to issue a summons which properly identifies the defendants to the action. *See* FED. R. CIV. P. 4(a). Specifically, FED. R. CIV. P. 4(j)(2) states that:

> Service upon a state, municipal corporation, or other governmental organization subject to suit shall be effected by delivering a copy of the summons and of the complaint to its chief executive officer or by serving the summons and complaint in the manner prescribed by the law of that state for the service of summons or other like process upon any such defendant.

Id. The New Jersey Court Rules provide that service of process upon local governments must be effected "by serving a copy of the summons and complaint . . . on the presiding officer or on the clerk or secretary thereof." *See N.J. Court Rule* 4:4-4(a)(8). Thus, for the County of Monmouth to be properly served, plaintiff was required to serve a copy of the summons and complaint "on the presiding officer or on the clerk or secretary" of the County of Monmouth. In the present action, plaintiff served a copy of the summons and complaint on defendant John Kaye, Monmouth County Prosecutor. Defendant John Kaye, however, is not the presiding officer, clerk or secretary of the County of Monmouth. Accordingly, plaintiff did not properly effect service of the summons and complaint upon the County of Monmouth.

Plaintiff's counsel asserts that "the fact that the County was not named as a defendant in the instant action is simply inconsequential. The fact is that the

County knew about the instant action from the inception more than four years ago." *See* Pl. Opp. Br. dated Nov. 17, 1994 at 6-7. Plaintiff's counsel's contention that the County of Monmouth had notice of the lawsuit and therefore service was "simply inconsequential" is meritless. As the Third Circuit held in *Grand Entertainment Group v. Star Media Sales*, 988 F.2d 476 (3d Cir. 1993),

> There is nothing strange about our conclusion that notice, though necessary, is not sufficient to effect service. Similar principles exist in Anglo-American law. Although notice underpins Federal Rule of Civil Procedure 4 concerning service, notice cannot by itself validate an otherwise defective service. Proper service is still a prerequisite to personal jurisdiction. Inquiry into the propriety of service is separate from, and in addition to, the due process concerns present in an inquiry into the notice itself. A district court's power to assert *in personam* authority over parties defendant is dependent not only on compliance with due process but also on compliance with the technicalities of Rule 4. Notice to a defendant that he has been sued does not cure defective service. . . .

Id. at 492. Because plaintiff failed to properly effective service of process on the County of Monmouth, this Court did not acquire personal jurisdiction over the County of Monmouth. As such, the jury's verdict of $15,000 in compensatory damages and the $350,000 in punitive damages against the County of Monmouth cannot stand. Accordingly, this Court will vacate the $365,000 jury award rendered against the County of Monmouth.

Alternatively, the County of Monmouth asserts that it cannot be held liable under a theory of respondeat superior for any of Prosecutor Kaye's actions. In *Lehmann v. Toys 'R' Us*, 132 N.J. 587 (1993), the New Jersey Supreme Court held that employers can be liable for the acts of their employees. *Id.* at 619. Specifically, the New Jersey Supreme Court held that "employer liability . . . shall be governed by agency principles." *Id.* Referencing Section 219 of the *Restatement (Second) of Agency*, the supreme court noted that:

> (1) A master is subject to liability for the torts of his servants committed while acting in the scope of their employment.
>
> (2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:
>
> > (a) the master intended the conduct or consequences, or
> >
> > (b) the master was negligent or reckless, or
> >
> > (c) the conduct violated a non-delegable duty of the master, or
> >
> > (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

Id. (quoting RESTATEMENT (SECOND) OF AGENCY § 219).

The principles of agency law presuppose that a master-servant relationship exists between the parties in question. As the court noted in *Morgan v. Air Brook Limousine, Inc.*, 211 N.J. Super. 84 (N.J. Super. Ct. Law Div.

1986), New Jersey courts employ a "control test" to determine whether or not a master-servant relationship is present. *Id.* at 105; *see also Stanley v. State Industries*, 267 N.J. Super. 167, 172 (N.J. Super. Ct. Law Div. 1993) ("Control is the essence of the employer-employee, master-servant and principal-agent relationship." (citations omitted)). Namely, courts will find the existence of a master-servant relationship " 'whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished, or in other words, not only what shall be done, but how it shall be done.' " *Id.* at 105 (citation omitted). Thus, this Court must initially determine whether a master-servant relationship existed between the County of Monmouth and Prosecutor John Kaye.

Specifically, this Court must determine whether the County of Monmouth exercises control over Prosecutor John Kaye. Pursuant to *N.J.S.A.* § 2A:158-1, each county prosecutor is appointed by the "governor with the advice and consent of the senate to serve for a term of 5 years. . . . " *Id.* In *Morss v. Forbes*, 24 N.J. 341 (1957), the New Jersey Supreme Court commented that:

> In truth, we encounter much difficulty in defining with complete exactitude the legal status of the prosecutor in our governmental scheme. . . . there is confusion and uncertainty with regard to his status by reason of the fact that [the prosecutor's] office is created by the Constitution, he is appointed by the Governor with the advice and consent of the Senate, the Legislature prescribes his duties, while he is paid by the county, plus the fact that the freeholders and the

> assignment judge of the county have general powers of supersedure . . .

Id. at 372. Nevertheless, the New Jersey Supreme Court noted that "the Governor enjoys a very real authority over the county prosecutors through his powers to supersede them in particular cases. To this extent, at least, the prosecutor's office is not completely divorced from control by the state executive." *Id.* at 371. As Justice Pashmam noted in *In re Investigation Regarding Ringwood Fact Finding Comm.*, 65 N.J. 512 (1974), New Jersey "has always recognized the prosecutor's primacy as a representative of the executive branch." *Id.* at 526 (Pashman, J., concurring in part and dissenting in part). Continuing, Justice Pashman commented that:

> The attorney general is free to supersede the prosecutor whenever he feels the interests of the State will be furthered by his doing so. . . . The effect of [this power] is to bring the county prosecutor more closely within the control and supervision of the executive branch through the attorney general, from whom the prosecutor's powers and authority were originally taken.

Id. at 529-30 (Pashman, J., concurring in part and dissenting in part) (citations omitted); *see also State v. Winne*, 12 N.J. 152, 171 (1953) ("In his county, as we have seen, the prosecutor is the foremost representative of the executive branch of government in the enforcement of the criminal law."). It is clear to this Court that the County of Monmouth does not exercise sufficient control over Prosecutor John Kaye to establish a master-servant relationship. Rather, county prosecutors are controlled by the Attorney General for the State of New Jersey; a member of the New

Jersey executive branch of government. As such, the County of Monmouth cannot be held liable on a theory of respondeat superior for the actions of Prosecutor John Kaye. Accordingly, this Court must vacate the $365,000 jury award rendered against the County of Monmouth on this ground as well.

C. Defendant Kaye's Post-Trial Fed. R. Civ. P. 50 Motion

Defendant John Kaye moves for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(b)[1] arguing that there was insufficient evidence for the jury to return a verdict of discrimination based on gender. As the district court stated in *Schreiber v. Shuler*, 1995 WL 60012 (E.D. Pa. Feb. 10, 1995),

> In ruling on a motion for judgment as a matter of law, a court must view the evidence in the light most favorable to the non-moving party and determine whether the record contains the minimum quantum of evidence from which a

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[1] Fed. R. Civ. P. 50(b) states that:

> Whenever a motion for judgment as a matter of law made at the close of all the evidence is denied or is for any reason not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Such a motion may be renewed by service and filing not later than 10 days after entry of judgment. A motion for a new trial under Rule 59 may be joined with a renewal of the motion for a judgment as a matter of law, or a new trial may be requested in the alternative.

Id.

> jury might reasonably afford relief." Stated another way, such a motion should be granted only if no reasonable jury could decide in that party's favor.

Id. at *1 (citing *Keith v. Truck Stops Corp. of America*, 909 F.2d 743, 745 (3d Cir. 1990); *Indian Coffee Corp. v. Proctor & Gamble Co.*, 752 F.2d 891, 894 (3d Cir. 1985), *cert. denied*, 474 U.S. 863 (1985)). "In other words, 'the court should grant the motion for a judgment as a matter of law only if, "viewing all the evidence which has been tendered and should have been admitted in the light most favorable to the party opposing the motion, no jury could decide in that party's favor." ' " *China Resource Products (U.S.A.) v. Fayda Intern.*, 856 F. Supp. 856, 859 (D.Del. 1994) (citations omitted). After presiding over the trial, this Court concludes that the record contained at least the "minimum quantum" of evidence necessary for the jury to find gender discrimination. Accordingly, this Court will deny defendant Kaye's motion for a judgment as a matter of law on all issues of liability.

Defendant Kaye also moves for a judgment as a matter of law pursuant to FED. R. CIV. P. 50(b) on the issues of compensatory and punitive damages. Specifically, defendant Kaye asserts that plaintiff is not entitled to either compensatory or punitive damages. In *New Market Inv. Corp. v. Fireman's Fund Ins. Co.*, 774 F. Supp. 909 (E.D.Pa. 1991), the district court set forth the standard of review that a district court must employ when evaluating a jury's damage award. *Id.* at 917. The district court stated that:

> It is not this Court's prerogative to substitute its own judgment as to the amount of damages for that of the jury. Thus, regardless of whether the trial judge agrees or disagrees with the jury's verdict, the verdict must be upheld so long as it is supported by a "minimum quantity of evidence from which a jury might reasonably [decline to] afford relief."

Id. (citing *Ford Motor Co. v. Summit Motor Products, Inc.*, 930 F.2d 277, 290 (3d Cir.), *cert. denied*, 502 U.S. 939 (1991)). Because this Court has already vacated the $365,000.00 jury award against the County of Monmouth, this Court must only consider the compensatory and punitive damages rendered against defendant Kaye. As mentioned previously, the jury found that defendant Kaye intentionally discriminated against plaintiff on the basis of gender, and therefore awarded plaintiff $10,000 in compensatory damages and $50,000 in punitive damages.

This Court will first consider the jury's compensatory damage award. In *Abrams v. Lightolier*, 841 F. Supp. 584 (D.N.J. 1994), *aff'd*, ___ F.3d ___, 1995 WL 124626 (3d Cir. March 24, 1995), the district court stated that under New Jersey's Law Against Discrimination, "a plaintiff may recover [compensatory] damages for pain, suffering, humiliation, or mental anguish experienced as a direct result of a discriminatory act." *Abrams*, 841 F. Supp. at 593 (citing *N.J.S.A.* § 10:5-13). Moreover, the district court noted that such compensatory damage awards have generally been nominal. *Id.* At trial, plaintiff testified that she suffered humiliation and mental anguish as a direct result of defendant Kaye's discriminatory acts. The jury found plaintiff Barbara Coleman's testimony credible and

awarded plaintiff $10,000 in compensatory damages against defendant Kaye for two separate incidents of gender discrimination. After carefully reviewing the record, this Court cannot find that the jury award of $10,000 in compensatory damages is either excessive or unreasonable. Thus, this Court will not disturb the jury award of $10,000 in compensatory damages.

This Court must also consider the jury's $50,000 award of punitive damages rendered against defendant Kaye. In *Levinson v. Prentice-Hall, Inc.*, 868 F.2d 558 (3d Cir. 1989), the Third Circuit recognized that punitive damages are allowable under New Jersey's Law Against Discrimination. *Id.* at 562-63. The Third Circuit noted, however, that a punitive damage award "must bear a reasonable relationship to the compensatory damages awarded." *Id.* at 564. In the present case, the jury determined that defendant John Kaye intentionally discriminated against plaintiff based upon gender by not promoting her to Sergeant in June 1990 and again in October 1990. *See* Second Verdict Sheet. As a result, the jury awarded plaintiff $50,000 in punitive damages; $15,000 attributable to the June 1990 incident and $35,000 attributable to the October 1990 incident. The jury's total punitive damage award is exactly five times the amount of the compensatory damages awarded. This Court cannot find the relationship between the compensatory and punitive damages awarded unreasonable, especially considering that the jury found that defendant John Kaye intentionally discriminated against plaintiff on two separate occasions. Accordingly, the Court will not disturb the jury award of $50,000 in punitive damages.

D. Defendant Kaye's Motion For A New Trial

In the alternative, defendant Kaye has made a motion for a new trial pursuant to Fed. R. Civ. P. 59. Specifically, Fed. R. Civ. P. 59(a) establishes that "[a] new trial may be granted to all or any of the parties and on all or part of the issues . . . in an action in which there has been a trial by jury. . . . " *Id.* The district court's ability to grant a new trial "is limited to those circumstances where a miscarriage of justice would result if the verdict were to stand. The purpose of this policy is to ensure that the trial court does not supplant the jury verdict with its own." *Abrams*, 841 F. Supp. at 592 (citations omitted). Generally, "[c]ourts do not grant new trials unless it is reasonably clear that prejudicial error has crept into the record or that substantial justice has not been done, and the burden of showing harmful error rests on the party seeking the new trial." 11 Charles A. Wright and Arthur R. Miller, Federal practice and Procedure § 2803, at 32 (1973); *see also Fineman v. Armstrong World Indus., Inc.*, 980 F.2d 171, 211 (3d Cir. 1992), *cert. denied*, 113 S.Ct. 1285 (1993) (trial court's power to order new trial limited to instances in which "a 'miscarriage of justice would result if the verdict were to stand' ") (quoting *Williamson v. Consol. Rail Corp.*, 926 F.2d 1344, 1352 (3d Cir. 1991)); *Lighting Lube, Inc. v. Witco Corp.*, 802 F. Supp. 1180, 1186 (D.N.J. 1992), *aff'd*, 4 F.3d 1153 (3d Cir. 1993) (" '[T]he following grounds have been recognized as general grounds for a new trial: the verdict is against the clear weight of the evidence; damages are excessive; the trial was unfair; and that substantial errors were made in the admission or

rejection of evidence or the giving or refusal of instructions.' " (citations omitted). In *Wagner v. Fair Acres Geriatric Center*, ___ F.3d ___, 1995 WL 107387 (3d Cir. March 15, 1995), the Third Circuit stated that "[t]he authority to grant a new trial resides in the exercise of sound discretion by the trial court, and will only be disturbed if the court abused that discretion." *Id.* at *13 (citing *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980); *American Bearing Co. v. Litton Industries, Inc.*, 729 F.2d 943 (3d Cir.), *cert. denied*, 469 U.S. 854 (1984)). After presiding over the trial and carefully considering defendant Kaye's motion, this Court is unable to find that any of the above grounds for a new trial have been satisfied. Accordingly, this Court must deny defendant Kaye's application for a new trial pursuant to FED. R. CIV. P. 59(a). An appropriate order is filed herewith.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

BARBARA COLEMAN,
Plaintiff,

v.

JOHN KAYE et al.,
Defendants.

Civ. No. 91-1140(GEB)

ORDER

(Filed
May 4, 1995)

For the reasons set forth in this Memorandum Opinion.

It is this 3rd day of May, 1995.

ORDERED that the County of Monmouth's motion to intervene pursuant to FED. R. CIV. P. 24 be and is hereby GRANTED; and it is

FURTHER ORDERED that the County of Monmouth's motion to vacate the verdict pursuant to FED. R. CIV. P. 60(b)(4) be and is hereby GRANTED; and it is

FURTHER ORDERED that defendant John Kaye's motion for judgment as a matter of law pursuant to FED. R. CIV. P. 50(b) be and is hereby DENIED; and it is

FURTHER ORDERED that defendant John Kaye's motion to alter or amend the judgment below be and is hereby DENIED; and it is

FURTHER ORDERED that defendant John Kaye's motion for a new trial pursuant to FED. R. CIV. P. 59(a) be and is hereby DENIED; and it is

FURTHER ORDERED that defendant John Kaye shall submit any opposition to plaintiff's counsel's application

for attorney's fees by May 21, 1995 and that plaintiff shall submit any reply thereto by May 28, 1995.

/s/ Garrett E. Brown, Jr.
GARRETT E. BROWN, JR.
U.S.D.J.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

BARBARA COLEMAN, Plaintiff, v. JOHN KAYE et al., Defendants.	:	Civ. No. 91-1140 (GEB) **JUDGMENT ORDER AND AMENDED ORDER** (Filed May 23, 1995)

BROWN, District Judge

This matter having come before the Court on plaintiff Barbara Coleman's action alleging that defendants Prosecutor John Kaye and the County Prosecutor's Office of the County of Monmouth discriminated against her based on gender; and this Court having conducted a seven-day jury trial; and the jury having deliberated and found that: (1) Prosecutor John Kaye intentionally discriminated against plaintiff based upon gender by not promoting her in May 1989 and/or in June 1990 and/or October 1990; (2) the County of Monmouth did not adopt a policy or custom of sexual discrimination that resulted in plaintiff not being promoted in May 1989 and/or June 1990 and/or October 1990; (3) Prosecutor John Kaye "and/or one or more of his subordinates who made recommendations to him intentionally discriminated against plaintiff because she was a woman, which discrimination proximately caused her non-promotion" in May 1989 and/or June 1990 and/or October 1990; (4) Prosecutor John Kaye did not intentionally decide not to promote plaintiff in June 1990 and/or October 1990 in retaliation for her filing an

EEOC complaint on November 7, 1989; (5) Prosecutor John Kaye and/or one or more of his subordinates did not intentionally retaliate against plaintiff because she filed an EEOC complaint by not promoting her in June 1990 and/or October 1990; (6) Prosecutor John Kaye did not intentionally discriminate against plaintiff based upon gender by not promoting her to Sergeant in May 1989; (7) Prosecutor John Kaye intentionally discriminated against plaintiff based upon gender by not promoting her to Sergeant in June 1990 and again in October 1990; (8) Prosecutor John Kaye did not intentionally discriminate against plaintiff based upon her gender by not promoting her to Lieutenant in June 1990; (9) Prosecutor John Kaye "and/or one or more of his subordinates who made recommendations to him intentionally discriminate[d] against plaintiff because she was a woman, which discrimination proximately caused her non-promotion to Sergeant" in May 1989, June 1990 and October 1990; (10) Prosecutor John Kaye "and/or one or more of his subordinates who made recommendations to him [did not] intentionally discriminate against plaintiff because she was a woman, which discrimination proximately caused her non-promotion to Lieutenant in June 1990"; (11) Prosecutor John Kaye did not intentionally discriminate against plaintiff based upon gender by not promoting her to Lieutenant in May 1989; and (12) Prosecutor John Kaye "and/or one or more of his subordinates who made recommendations to him [did not] intentionally discriminate against plaintiff because she was a woman, which discrimination proximately caused her non-promotion to Lieutenant in May 1989"; and the jury having awarded

plaintiff Coleman $15,000 against the County of Monmouth for compensatory damages and $350,000 against the County of Monmouth for punitive damages; and the jury having further awarded plaintiff $10,000 against Prosecutor John Kaye for compensatory damages and $50,000 against Prosecutor John Kaye for punitive damages; and good and sufficient cause having been shown;

It is this 23rd day of May, 1995,

ORDERED that the jury's above-mentioned findings and award of damages be and are hereby ENTERED as the FINAL JUDGMENT of this Court; and it is

FURTHER ORDERED that the County of Monmouth's motion to intervene pursuant to FED. R. CIV. P. 24 be and is hereby GRANTED; and it is

FURTHER ORDERED that the County of Monmouth's motion to vacate the verdict pursuant to FED. R. CIV. P. 60(b)(4) be and is hereby GRANTED; and it is

FURTHER ORDERED that defendant John Kaye's motion for judgment as a matter of law pursuant to FED. R. CIV. P. 50(b) be and is hereby DENIED; and it is

FURTHER ORDERED that defendant John Kaye's motion to alter or amend the judgment below be and is hereby DENIED; and it is

FURTHER ORDERED that defendant John Kaye's motion for a new trial pursuant to FED. R. CIV. P. 59(a) be and is hereby DENIED; and it is

FURTHER ORDERED that plaintiff may file a supplemental fee application by May 22, 1995 and defendant

John Kaye shall submit any opposition to plaintiff's counsel's application for attorney's fees by June 15, 1995 and that plaintiff shall submit any reply thereto by June 20, 1995.

/s/ Garrett E Brown
GARRETT E. BROWN, JR.,
U.S.D.J.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

BARBARA COLEMAN, Plaintiff,	:	Civ. No. 91-1140 (GEB)
v.	:	**ORDER**
JOHN KAYE et al., Defendants.	:	(Filed Jun. 16, 1995)

This matter having come before the Court on plaintiff's request pursuant to General Rule 12(I) of the Rules of this Court for reconsideration of this Court's Memorandum Opinion issued on May 3, 1995 in which the Court granted the County of Monmouth's motion to intervene and vacate the judgment; and the Court having reviewed the record and considered the papers submitted herein; and it appearing that plaintiff is merely raising her disagreement with the Court's initial decision; and this matter being decided without oral argument pursuant to FED. R. CIV. P. 78; and good cause having been shown;

It is this 15th day of June, 1995,

ORDERED that plaintiff's motion for reconsideration pursuant to General Rule 12(I) be and is hereby DENIED.

/s/ Garrett E. Brown Jr.
GARRETT E. BROWN, JR.,
U.S.D.J.

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

BARBARA COLEMAN, Plaintiff,	:	Civ. No. 91-1140 (GEB)
v.	:	**MEMORANDUM**
JOHN KAYE et al.,	:	**OPINION**
Defendants.	:	(Filed Aug. 17, 1995)

GARRETT E. BROWN, JR., U.S.D.J.

This matter comes before the Court on plaintiff's counsels' request for attorneys' fees pursuant to 42 U.S.C. § 2000e-5(k) and *N.J.S.A.* § 10:5-27.1. For the reasons set forth in this Memorandum Opinion, issued without oral argument pursuant to FED. R. CIV. P. 78, this Court will award plaintiff's counsel $105,146.92 representing all attorneys' fees and costs incurred by plaintiff's counsel in this matter.

I. BACKGROUND

This Court adequately set forth the factual background of this action in the Memorandum Opinion dated May 3, 1995.

II. DISCUSSION

Both Title VII and New Jersey's Law Against Discrimination authorize courts to award reasonable attorneys' fees to prevailing parties in discrimination actions.

See 42 U.S.C. § 2000e-5(k); *N.J.S.A.* § 10:5-27.1. The determination of awarding reasonable attorneys' fees involves several steps. First, the court must determine whether the fee applicant is a "prevailing party." To be considered a prevailing party, the petitioner must have obtained at least some form of relief on the merits, *e.g.*, a judgment, consent decree or settlement, that changes the legal relationship of the parties. *Farrar v. Hobby*, 113 S. Ct. 566, 573 (1992); *Texas State Teachers Ass'n v. Garland Indep. School Dist.*, 489 U.S. 782, 792 (1989); *Hewitt v. Helms*, 482 U.S. 755, 760 (1987). If the court concludes that the petitioner was a prevailing party in the underlying litigation, the next step is to determine a reasonable fee. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1988). To determine a reasonable fee, the court first arrives at a lodestar, which is the product of a reasonable hourly rate multiplied by the total hours reasonably expended on the successful claims. *Rode v. Dellarciprete*, 892 F.2d 1177, 1183 (3d Cir. 1990) (quoting *Hensley*, 461 U.S. at 433). The party seeking fees must demonstrate that its fee request is reasonable, and must meet this burden by submitting evidence to establish the hours worked and the rates claimed. *Id.* In statutory fee cases such as here, the burden then shifts to the challenger to the fee award, to submit affidavits or a brief challenging the requested fee. *Id.* (citing *Bell v. United Princeton Properties, Inc.*, 884 F.2d 713 (3d Cir. 1989)). Finally, the district court has significant discretion to adjust upward or downward the lodestar figure, if the petitioner has achieved "exceptional success" or seeks fees that are exaggerated in relation to the results obtained, *id.*, or based upon the contingent nature of the case. *Pennsylvania v. Delaware Valley Citizens' Council for*

Clean Air, 478 U.S. 546, 563 (1986) (*Delaware Valley I*). *See also In re Fine Paper Antitrust Litigation*, 751 F.2d 562 (3d Cir. 1984).

A. Calculating the Lodestar Figure

1. *The Hours Reasonably Expended by Plaintiff's Counsel*

In this case, defendants assert that there should be either a denial or at least a sharp reduction in the fee amount plaintiff's counsel seeks. Specifically, defendants argue that the application is inadequate because it is not sufficiently specific for the Court to determine if the hours plaintiff's counsel worked were reasonable. After reviewing plaintiff's application for fees, the Court agrees with defendants that the application is not a model of specificity and substantiation. Nevertheless, the Court does not find these deficiencies to be fatal to plaintiff's application. The Third Circuit addressed the issue of specificity in *Rode v. Dellarciprete*, 892 F.2d 1177 (3d Cir. 1990). The district court had awarded plaintiffs less than one-third of the fees and costs initially requested, because the district court found the application to be substantially inadequate. Reversing in part the district court's decision, the Third Circuit noted that plaintiffs submitted the following:

> [A] computer-generated chronological list of the tasks performed and the time devoted to those tasks by the two attorneys, the paralegal and the law clerk who worked on the case. Appellants also submitted many of the actual time slips used to generate the computer list. Further . . . appellants submitted to the district court

> monthly statements of time which explained the work performed, the hours necessary to perform the work and the total time worked each month by each attorney, paralegal and law clerk.

Rode, 892 F.2d at 1189. Repeating the standard it enunciated in *Lindy Bros. Builders Inc. of Phila. v. Amer. Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3d Cir. 1973) (*Lindy I*), the Third Circuit noted that a fee petition should set forth " 'some fairly definite information as to the hours devoted to various general activities, e.g., pretrial discovery, settlement negotiations, and the hours spent by various classes of attorneys, e.g., senior partners, junior partners [and] associates.' " *Rode*, 892 F.2d at 1190 (quoting *Lindy Bros. Inc.*, 487 F.2d at 167). Although the Third Circuit expressly declined to address the issue of whether petitioner's failure to include time slips warranted a reduction in the hours computed into the lodestar, *id.* at 1191 n.14, it did determine that a time sheet for each attorney, providing "the general nature of the activity and the subject matter of the activity where possible [*e.g.*, deposition, appeal brief, or client contact], the date the activity took place and the amount of time on the activity[,]" satisfied the standard set forth in *Lindy Bros. Inc. Id.* at 1191-92.

In this case, plaintiff has set forth substantially the same information as in *Rode*, *i.e.*, time sheets for each attorney, which list in chronological order the particular nature of the work performed, the date that work was performed, and the time spent on that activity. Plaintiff's counsel's method of recordation sufficiently enables the Court to determine whether the hours charged are reasonable. Thus, the Court finds the petition sufficient for

consideration, and will decline to reduce the hours computed into the lodestar figure based on lack of specificity or substantiation. Accordingly, this Court finds the following hours charged as reasonable: (1) 375.80 hours for Linda Kenney; (2) 255.50 for associate Gregory S. Schaer; (3) 18.20 hours for associate Walter Lucas; (4) 60.55 hours for associates L. Lences; (5) 2.00 hours for associate B. Ansell; (6) 44.6 hours for paralegal Joann Lane; and (7) .10 of an hour for paralegal J. Bennett. *See* Certification of Linda B. Kenny (hereinafter "Kenney Certif.") as Exs. B, C.

2. *Plaintiff's Counsel's Billing Rates*

The next consideration is the various billing rates submitted by plaintiff's counsel. The various hourly fees plaintiff's counsel seek are as follows: (1) $300 per hour for Linda Kenney's services; (2) $250 per hour for Linda Kenney's associate Gregory S. Schaer; (3) $250 per hour for Linda Kenney's associate Walter Lucas; (4) $190 per hour for Linda Kenney's associates L. Lences and B. Ansell; and (5) between $80 and $90 per hour for Linda Kenney's paralegals Joann Lane and J. Bennett. *See* Kenney Certif. Exs. B, C, D, E, F, G. In *Rode*, the Third Circuit stated that

> After determining the number of hours reasonably expended, the district court must examine whether the requested hourly rate is reasonable. Generally, a reasonable hourly rate is to be calculated according to the prevailing market rates in the relevant community. Thus, the court should assess the experience and skill of the prevailing party's attorneys and compare

> their rates to the rates prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.

Rode, 892 F.2d at 1183 (citations omitted).

As the Third Circuit instructs, this Court "should assess the experience and skill of the prevailing party's attorneys and compare their rates to the rates prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." *Rode*, 892 F.2d at 1183 (citations omitted). Throughout the entire adjudication of this matter, this Court has had a significant opportunity to assess the skills and experience of the attorneys involved. As a result, this Court will reduce plaintiff's counsels' hourly rates to "rates prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." *Id.* Accordingly, the Court will reduce plaintiff's counsels' rates as follows: (1) $175 per hour for Linda Kenney's services; (2) $100 per hour for Linda Kenney's associates Gregory S. Schaer, Walter Lucas, L. Lences and B. Ansell; and (5) $40 per hour for Linda Kenney's paralegals Joann Lane and J. Bennett.[1]

B. Adjustments to the Lodestar Calculation

As noted above, the lodestar may be adjusted for any of several factors. The district courts have discretion to enhance the fees sought if the plaintiff has achieved

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[1] For the actual lodestar calculations see **Appendix** attached to this Memorandum Opinion and Order.

"exceptional success," or if the plaintiff's counsel incurred a significant risk of no recovery in taking on the plaintiff as a client. By contrast, the court may reduce the award if the plaintiff's counsel seeks grossly excessive fees, or if the degree of success was nominal or minimal compared to the fees sought. *See Farrar v. Hobby*, 113 S. Ct. 566, 574-75 (1992); *Hensley*, 461 U.S. at 437. In this case, the Court does not find that either an enhancement or a negative multiplier is appropriate. An enhancement is not warranted in this application because it did not raise establish precedent or achieve an "exceptional success." Moreover, plaintiff has not identified, nor has the Court discerned, an unusually significant risk of total loss to plaintiff or her counsel. On the other hand, a negative multiplier is clearly unwarranted because the Court finds that at trial, counsel for all parties litigated this matter to a conclusion in an effective and professional manner.

C. Costs

Plaintiff's counsel also seeks costs in the amount of $3,968.92. Defendants' counsel does not contest plaintiff's counsels' request for such costs. *Rode*, 892 F.2d at 1183. Accordingly, the Court will award plaintiff's counsel costs in the amount of $3968.92. An appropriate order is filed herewith.

/s/ Garrett E. Brown Jr.
GARRETT E. BROWN, JR.,
U.S.D.J.

APPENDIX

ATTORNEYS' FEES

1. *LINDA KENNEY:* 375.80 hours x $175/ per hour = $65,765.00

2. *GREGORY S. SCHAER:* 255.50 hours x $100/ per hour = $25,550.00

3. *WALTER LUCAS:* 18.20 hours x $100/ per hour = $1,820.00

4. *L. LENCES:* 60.55 hours x $100/ per hour = $6,055.00

5. *B. ANSELL:* 2.00 hours x $100/ per hour = $200.00

6. *JOANN LANE:* 44.60 hours x $40/per hour = $1,784.00

7. *J. BENNETT:* .10 of an hour x $40/per hour = $4.00

TOTAL ATTORNEYS' FEES: $101,178.00

TOTAL COSTS INCURRED: $3,968.92

GRAND TOTAL: $105,146.92

/s/ Garrett E. Brown, Jr.
GARRETT E. BROWN, JR.,
U.S.D.J.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

BARBARA COLEMAN, Plaintiff,	:	Civ. No. 91-1140 (GEB)
v.	:	**ORDER**
JOHN KAYE et al., Defendants.	:	(Filed Aug. 17, 1995)

For the reasons set forth in this Court's Memorandum Opinion, issued without oral argument pursuant to FED. R. CIV. P. 78;

It is this 16th day of August, 1995,

ORDERED that the application of plaintiff's counsel, Linda Kenney, for an award of attorneys' fees and costs pursuant to 42 U.S.C. § 2000e-5(k) and *N.J.S.A.* § 10:5-27.1 be and is hereby GRANTED; and it is

FURTHER ORDERED that defendants shall remit to plaintiff's counsel, Linda Kenney, the sum of $101,178.00 representing all attorneys' fees incurred by plaintiff's counsel in this matter; and it is

FURTHER ORDERED that defendants shall remit to plaintiff's counsel, Linda Kenney, the sum of $3,968.92 representing all costs incurred by plaintiff's counsel in this matter.

/s/ Garrett E. Brown Jr.
GARRETT E. BROWN, JR.,
U.S.D.J.

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

BARBARA COLEMAN, Plaintiff, v. JOHN KAYE et al., Defendants.	Civ. No. 91-1140 (GEB) **AMENDED MEMORANDUM OPINION** (Filed Sep. 8, 1995)

GARRETT E. BROWN, JR., U.S.D.J.

This matter comes before the Court on plaintiff's counsels' request for attorneys' fees pursuant to 42 U.S.C. § 2000e-5(k) and *N.J.S.A.* § 10:5-27.1. For the reasons set forth in this Amended Memorandum Opinion, issued without oral argument pursuant to FED. R. CIV. P. 78, this Court will award plaintiff's counsel $105,152.92 representing all attorneys' fees and costs incurred by plaintiff's counsel in this matter.

I. BACKGROUND

This Court adequately set forth the factual background of this action in the Memorandum Opinion dated May 3, 1995.

II. DISCUSSION

Both Title VII and New Jersey's Law Against Discrimination authorize courts to award reasonable attorneys' fees to prevailing parties in discrimination actions. *See* 42 U.S.C. § 2000e-5(k); *N.J.S.A.* § 10:5-27.1. The determination of awarding reasonable attorneys' fees involves several steps. First, the court must determine whether the fee applicant is a "prevailing party." To be considered a prevailing party, the petitioner must have obtained at least some form of relief on the merits, *e.g.*, a judgment, consent decree or settlement, that changes the legal relationship of the parties. *Farrar v. Hobby*, 113 S. Ct. 566, 573 (1992); *Texas State Teachers Ass'n v. Garland Indep. School Dist.*, 489 U.S. 782, 792 (1989); *Hewitt v. Helms*, 482 U.S. 755, 760 (1987). If the court concludes that the petitioner was a prevailing party in the underlying litigation, the next step is to determine a reasonable fee. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1988). To determine a reasonable fee, the court first arrives at a lodestar, which is the product of a reasonable hourly rate multiplied by the total hours reasonably expended on the successful claims. *Rode v. Dellarciprete*, 892 F.2d 1177, 1183 (3d Cir. 1990) (quoting *Hensley*, 461 U.S. at 433). The party seeking fees must demonstrate that its fee request is reasonable, and must meet this burden by submitting evidence to establish the hours worked and the rates claimed. *Id.* In statutory fee cases such as here, the burden then shifts to the challenger to the fee award, to submit affidavits or a brief challenging the requested fee. *Id.* (citing *Bell v. United Princeton Properties, Inc.*, 884 F.2d 713 (3d Cir. 1989)). Finally, the district court has significant discretion to adjust upward or downward the lodestar figure, if the

petitioner has achieved "exceptional success" or seeks fees that are exaggerated in relation to the results obtained, *id.*, or based upon the contingent nature of the case. *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 563 (1986) (*Delaware Valley I*). *See also In re Fine Paper Antitrust Litigation*, 751 F.2d 562 (3d Cir. 1984).

A. Calculating the Lodestar Figure

1. *The Hours Reasonably Expended by Plaintiff's Counsel*

In this case, defendants assert that there should be either a denial or at least a sharp reduction in the fee amount plaintiff's counsel seeks. Specifically, defendants argue that the application is inadequate because it is not sufficiently specific for the Court to determine if the hours plaintiff's counsel worked were reasonable. After reviewing plaintiff's application for fees, the Court agrees with defendants that the application is not a model of specificity and substantiation. Nevertheless, the Court does not find these deficiencies to be fatal to plaintiff's application. The Third Circuit addressed the issue of specificity in *Rode v. Dellarciprete*, 892 F.2d 1177 (3d Cir. 1990). The district court had awarded plaintiffs less than one-third of the fees and costs initially requested, because the district court found the application to be substantially inadequate. Reversing in part the district court's decision, the Third Circuit noted that plaintiffs submitted the following:

> [A] computer-generated chronological list of the tasks performed and the time devoted to those tasks by the two attorneys, the paralegal and the

> law clerk who worked on the case. Appellants also submitted many of the actual time slips used to generate the computer list. Further . . . appellants submitted to the district court monthly statements of time which explained the work performed, the hours necessary to perform the work and the total time worked each month by each attorney, paralegal and law clerk.

Rode, 892 F.2d at 1189. Repeating the standard it enunciated in *Lindy Bros. Builders Inc. of Phila. v. Amer. Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3d Cir. 1973) (*Lindy I*), the Third Circuit noted that a fee petition should set forth " 'some fairly definite information as to the hours devoted to various general activities, e.g., pretrial discovery, settlement negotiations, and the hours spent by various classes of attorneys, e.g., senior partners, junior partners [and] associates.' " *Rode*, 892 F.2d at 1190 (quoting *Lindy Bros. Inc.*, 487 F.2d at 167). Although the Third Circuit expressly declined to address the issue of whether petitioner's failure to include time slips warranted a reduction in the hours computed into the lodestar, *id.* at 1191 n.14, it did determine that a time sheet for each attorney, providing "the general nature of the activity and the subject matter of the activity where possible [*e.g.*, deposition, appeal brief, or client contact], the date the activity took place and the amount of time on the activity[,]" satisfied the standard set forth in *Lindy Bros. Inc. Id.* at 1191-92.

In this case, plaintiff has set forth substantially the same information as in *Rode, i.e.*, time sheets for each attorney, which list in chronological order the particular nature of the work performed, the date that work was

performed, and the time spent on that activity. Plaintiff's counsel's method of recordation sufficiently enables the Court to determine whether the hours charged are reasonable. Thus, the Court finds the petition sufficient for consideration, and will decline to reduce the hours computed into the lodestar figure based on lack of specificity or substantiation. Accordingly, this Court finds the following hours charged as reasonable: (1) 375.80 hours for Linda Kenney; (2) 255.50 for associate Gregory S. Schaer; (3) 18.20 hours for associate Walter Lucas; (4) 60.55 hours for associates L. Lences; (5) 2.00 hours for associate B. Ansell; (6) .10 of an hour for associate J. Bennett; and (7) 44.6 hours for paralegal Joann Lane. *See* Certification of Linda B. Kenny (hereinafter "Kenney Certif.") at Exs. B, C.

2. *Plaintiff's Counsel's Billing Rates*

The next consideration is the various billing rates submitted by plaintiff's counsel. The various hourly fees plaintiff's counsel seek are as follows: (1) $300 per hour for Linda Kenney's services; (2) $250 per hour for Linda Kenney's associate Gregory S. Schaer; (3) $250 per hour for Linda Kenney's associate Walter Lucas; (4) $190 per hour for Linda Kenney's associates L. Lences and B. Ansell; and (5) between $80 and $90 per hour for Linda Kenney's paralegal Joann Lane. *See* Kenney Certif. Exs. B, C, D, E, F, G. In *Rode*, the Third Circuit stated that

> After determining the number of hours reasonably expended, the district court must examine whether the requested hourly rate is reasonable. Generally, a reasonable hourly rate is to be calculated according to the prevailing market rates in the relevant community. Thus,

> the court should assess the experience and skill of the prevailing party's attorneys and compare their rates to the rates prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.

Rode, 892 F.2d at 1183 (citations omitted).

As the Third Circuit instructs, this Court "should assess the experience and skill of the prevailing party's attorneys and compare their rates to the rates prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation" *Rode*, 892 F.2d at 1183 (citations omitted). Throughout the entire adjudication of this matter, this Court has had a significant opportunity to assess the skills and experience of the attorneys involved. As a result, this Court will reduce plaintiff's counsels' hourly rates to "rates prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." *Id.* Accordingly, the Court will reduce plaintiff's counsels' rates as follows: (1) $175 per hour for Linda Kenney's services; (2) $100 per hour for Linda Kenney's associates Gregory S. Schaer, Walter Lucas, L. Lences, B. Ansell and J. Bennett; and (5) $40 per hour for Linda Kenney's paralegal Joan Lane.[1]

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[1] For the actual lodestar calculation see **Appendix** attached to this Memorandum Opinion and Order.

B. Adjustments to the Lodestar Calculation

As noted above, the lodestar may be adjusted for any of several factors. The district courts have discretion to enhance the fees sought if the plaintiff has achieved "exceptional success," or if the plaintiff's counsel incurred a significant risk of no recovery in taking on the plaintiff as a client. By contrast, the court may reduce the award if the plaintiff's counsel seeks grossly excessive fees, or if the degree of success was nominal or minimal compared to the fees sought. *See Farrar v. Hobby*, 113 Sc. [sic] Ct. 566, 574-75 (1992); *Hensley*, 461 U.S. at 437. In this case, the Court does not find that either an enhancement or a negative multiplier is appropriate. An enhancement is not warranted in this application because it did not raise establish precedent or achieve an "exceptional success." Moreover, plaintiff has not identified, nor has the Court discerned, an unusually significant risk of total loss to plaintiff or her counsel. On the other hand, a negative multiplier is clearly unwarranted because the Court finds that at trial, counsel for all parties litigated this matter to a conclusion in an effective and professional manner.

C. Costs

Plaintiff's counsel also seeks costs in the amount of $3,968.92. Defendants' counsel does not contest plaintiff's counsels' request for such costs. *Rode*, 892 F.2d at 1183. Accordingly, the Court will award plaintiff's counsel

costs in the amount of $3968.92. An appropriate order is filed herewith.

/s/ Garrett E. Brown, Jr.
GARRETT E. BROWN, JR.,
U.S.D.J.

APPENDIX

ATTORNEYS' FEES

1. LINDA KENNEY: 375.80 hours x $175/per hour = $65,765.00

2. GREGORY S. SCHAER: 255.50 hours x $100/per hour = $25,550.00

3. WALTER LUCAS: 18.20 hours x $100/per hour = $1,820.00

4. L. LENCES: 60.55 hours x $100/per hour = $6,055.00

5. B. ANSELL: 2.00 hours x $100/per hour = $200.00

6. J. BENNETT: .10 of an hour x $100/per hour = $10.00

7. JOANN LANE: 44.60 hours x $40/per hour = $1,784.00

TOTAL ATTORNEYS' FEES:	**$101,184.00**
TOTAL COSTS INCURRED:	**$3,968.92**
GRAND TOTAL:	**$105,152.92**

/s/ Garrett E. Brown, Jr.
GARRETT E. BROWN, JR.,
U.S.D.J.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

BARBARA COLEMAN, Plaintiff, v. JOHN KAYE et al., Defendants.	Civ. No. 91-1140 (GEB) **ORDER** (Filed Sep. 8, 1995)

For the reasons set forth in this Court's Amended Memorandum Opinion, issued without oral argument pursuant to FED. R. CIV. P. 78;

It is this 7th day of September, 1995,

ORDERED that the application of plaintiff's counsel, Linda Kenney, for an award of attorneys' fees and costs pursuant to 42 U.S.C. § 2000e-5(k) and *N.J.S.A.* § 10:5-27.1 be and is hereby GRANTED; and it is

FURTHER ORDERED that defendants shall remit to plaintiff's counsel, Linda Kenney, the sum of $101,184.00 representing all attorneys' fees incurred by plaintiff's counsel in this matter; and it is

FURTHER ORDERED that defendants shall remit to plaintiff's counsel, Linda Kenney, the sum of $3,968.92 representing all costs incurred by plaintiff's counsel in this matter.

/s/ Garrett E. Brown, Jr.
GARRETT E. BROWN, JR.,
U.S.D.J.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

BARBARA COLEMAN, Plaintiff, v. JOHN KAYE, individually and in his capacity as Monmouth County Prosecutor, THE COUNTY PROSECUTOR'S OFFICE OF THE COUNTY OF MONMOUTH, JOHN DOES (1-100) and JANE DOES (1-100), Defendants.	:	Civil Action No. 91-1140(GEB) *Civil Action* ***ORDER ON THE MANDATE*** (Filed Sep 25, 1996)

It appearing this matter having come before this Court on the mandate from the United States Court of Appeals for the Third Circuit filed on August 15, 1996 ordering and adjudging the Order of the United States District Court for the District of New Jersey entered on June 20, 1995, be affirmed in part and remanded in part and is remanded with instructions consistent with the Opinion of the Third Circuit Court of Appeals, with appellate costs taxed in the sum of $1,665.33 in favor of the plaintiff, Estate of Barbara Coleman;

IT IS SO ORDERED on this 24th day of September, 1996, the order of this Court entered on June 20, 1995 is hereby affirmed in part, reversed in part, and remanded in part, pursuant to the aforesaid mandate, with appellate

costs taxed in the sum of $1,665.33 in favor of the plaintiff, Estate of Barbara Coleman, and against the defendants, County Prosecutor's Office of the County of Monmouth and John Kaye.

/s/ Garrett E. Brown, Jr.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 95-5439/5469/5708/5742

BARBARA COLEMAN,

Appellant Nos.
95-5439/5742

v.

JOHN KAYE, Individually, and in his capacity as Monmouth County Prosecutor; COUNTY PROSECUTOR'S OFFICE OF THE COUNTY OF MONMOUTH; JOHN DOES, 1-100; JANE DOES, 1-100

COUNTY OF MONMOUTH,

Intervenor in D.C.

BARBARA COLEMAN

v.

JOHN KAYE, Individually, and in his capacity as Monmouth County Prosecutor; THE COUNTY PROSECUTOR'S OFFICE OF THE COUNTY OF MONMOUTH; JOHN DOES, 1-100; JANE DOES, 1-100

COUNTY OF MONMOUTH

Intervenor in D.C.

John Kaye,

Appellant Nos.
95-5469/5708

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, *Chief Judge*, BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, and MC KEE, *Circuit Judges* and CINDRICH*, *District Judge*

The petition for rehearing filed by appellant John Kaye and appellee County of Monmouth having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

Judge Becker and Judge Alito would have granted rehearing en banc.

By the Court,

/s/ Robert E. Cowen
Circuit Judge

Dated: AUG 6 1996

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* As to panel rehearing.

U.S. CONST. amend. XIV, § 1.

Amendment XIV.

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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42 U.S.C. § 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(R.S. § 1979; Pub. L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284.)

N.J.S.A. 10:5-1 *et seq.*

10:5-1. Short title

This act shall be known as "Law Against Discrimination." L.1945, c. 169, p. 589, § 1, eff. April 16, 1945.

10:5-5. Definitions

As used in this act, unless a different meaning clearly appears from the context:

a. "Person" includes one or more individuals, partnerships, associations, organizations, labor organizations, corporations, legal representatives, trustees, trustees in bankruptcy, receivers, and fiduciaries.

b. "Employment agency" includes any person undertaking to procure employees or opportunities for others to work.

c. "Labor organization" includes any organization which exists and is constituted for the purpose, in whole or in part, of collective bargaining, or of dealing with employers concerning grievances, terms or conditions of employment, or of other mutual aid or protection in connection with employment.

d. "Unlawful employment practice" and "unlawful discrimination" include only those unlawful practices and acts specified in section 11 of this act.[1]

e. "Employer" includes all persons as defined in subsection a. of this section unless otherwise specifically exempt under another section of this act, and includes the State, any political or civil subdivision thereof, and all public officers, agencies boards or bodies.

f. "Employee" does not include any individual employed in the domestic service of any person.

g. "Liability for service in the Armed Forces of the United States" means subject to being ordered as an individual or member of an organized unit into active service in the Armed Forces of the United States by reason of membership in the National Guard, naval militia or a reserve component of the Armed Forces of the United States, or subject to being inducted into such armed forces through a system of national selective service.

h. "Division" means the "Division on Civil Rights" created by this act.

i. "Attorney General" means the Attorney General of the State of New Jersey or his representative or designee.

j. "Commission" means the Commission on Civil Rights created by this act.

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[1] Section 10:5-12.

k. "Director" means the Director of the Division on Civil Rights.

l. "A place of public accommodation" shall include, but not be limited to: any tavern, roadhouse, hotel, motel, trailer camp, summer camp, day camp, or resort camp, whether for entertainment of transient guests or accommodation of those seeking health, recreation or rest; any producer, manufacturer, wholesaler, distributor, retail shop, store, establishment, or concession dealing with goods or services of any kind; any restaurant, eating house, or place where food is sold for consumption on the premises; any place maintained for the sale of ice cream, ice and fruit preparations or their derivatives, soda water or confections, or where any beverages of any kind are retailed for consumption on the premises; any garage, any public conveyance operated on land or water, or in the air, any stations and terminals thereof; any bathhouse, boardwalk, or seashore accommodation; any auditorium, meeting place, or hall; any theatre, motion-picture house, music hall, roof garden, skating rink, swimming pool, amusement and recreation park, fair, bowling alley, gymnasium, shooting gallery, billiard and pool parlor, or other place of amusement; any comfort station; any dispensary, clinic or hospital; any public library; any kindergarten, primary and secondary school, trade or business school, high school, academy, college and university, or any educational institution under the supervision of the State Board of Education, or the Commissioner of Education of the State of New Jersey. Nothing herein contained shall be construed to include or to apply to any institution, bona fide club, or place of accommodation, which is in its nature distinctly private;

nor shall anything herein contained apply to any educational facility operated or maintained by a bona fide religious or sectarian institution, and the right of a natural parent or one in loco parentis to direct the education and upbringing of a child under his control is hereby affirmed; nor shall anything herein contained be construed to bar any private secondary or postsecondary school from using in good faith criteria other than race, creed, color, national origin, ancestry or affectional or sexual orientation, in the admission of students.

m. "A publicly assisted housing accommodation" shall include all housing built with public funds or public assistance pursuant to P.L.1949, c. 300,[2] P.L.1941, c. 213,[3] P.L.1944, c. 169,[4] P.L. 1949, c. 303,[5] P.L. 1938, c. 19,[6] P.L. 1938, c. 20,[7] P.L. 1946, c. 52,[8] and P.L. 1949, c. 184,[9] and all housing financed in whole or in part by a loan, whether or not secured by a mortgage, the repayment of which is guaranteed or insured by the federal government or any agency thereof.

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[2] Section 55:14A-31 et seq. Repealed. See, now, § 40A:12A-1 et seq.

[3] Section 55:14C-1 et seq. Repealed. See, now, § 40A:12A-1 et seq.

[4] Section 55:14D-1 et seq.

[5] Section 55:14H-1 et seq.

[6] Section 55:14A-1 et seq. Repealed. See, now, § 40A:12A-1 et seq.

[7] Section 55:14B-1 et seq. Repealed. See, now, § 40A:12A-1 et seq.

[8] Section 55:14E-1 et seq.

[9] Section 55:16-1 et seq.

n. The term "real property" includes real estate, lands, tenements and hereditaments, corporeal, and incorporeal, and leaseholds, provided, however, that, except as to publicly assisted housing accommodations, the provisions of this act shall not apply to the rental: (1) of a single apartment or flat in a two-family dwelling, the other occupancy unit of which is occupied by the owner as a residence or the household of the owner's family at the time of such rental; or (2) of a room or rooms to another person or persons by the owner or occupant of a one-family dwelling occupied by the owner or occupant as a residence or the household of the owner or occupant's family at the time of such rental. Nothing herein contained shall be construed to bar any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization, in the sale, lease or rental of real property, from limiting admission to or giving preference to persons of the same religion or denomination or from making such selection as is calculated by such organization to promote the religious principles for which it is established or maintained. Nor does any provision under this act regarding discrimination on the basis of familial status apply with respect to housing for older persons.

o. "Real estate broker" includes a person, firm or corporation who, for a fee, commission or other valuable consideration, or by reason of promise or reasonable expectation thereof, lists for sale, sells, exchanges, buys or rents, or offers or attempts to negotiate a sale, exchange, purchase, or rental of real estate or an interest

therein, or collects or offers or attempts to collect rent for the use of real estate, or solicits for prospective purchasers or assists or directs in the procuring of prospects or the negotiation or closing of any transaction which does or is contemplated to result in the sale, exchange, leasing, renting or auctioning of any real estate, or negotiates, or offers or attempts or agrees to negotiate a loan secured or to be secured by mortgage or other encumbrance upon or transfer of any real estate for others; or any person who, for pecuniary gain or expectation of pecuniary gain conducts a public or private competitive sale of lands or any interest in lands. In the sale of lots, the term "real estate broker" shall also include any person, partnership, association or corporation employed by or on behalf of the owner or owners of lots or other parcels of real estate, at a stated salary, or upon a commission, or upon a salary and commission or otherwise, to sell such real estate, or any parts thereof, in lots or other parcels, and who shall sell or exchange, or offer or attempt or agree to negotiate the sale or exchange, of any such lot or parcel of real estate.

p. "Real estate salesperson" includes any person who, for compensation, valuable consideration or commission, or other thing of value, or by reason of a promise or reasonable expectation thereof, is employed by and operates under the supervision of a licensed real estate broker to sell or offer to sell, buy or offer to buy or negotiate the purchase, sale or exchange of real estate, or offers or attempts to negotiate a loan secured or to be secured by a mortgage or other encumbrance upon or transfer of real estate, or to lease or rent, or offer to lease or rent any real estate for others, or to collect rents for the

use of real estate, or to solicit for prospective purchasers or lessees of real estate, or who is employed by a licensed real estate broker to sell or offer to sell lots or other parcels of real estate, at a stated salary, or upon a commission, or upon a salary and commission, or otherwise to sell real estate, or any parts thereof, in lots or other parcels.

q. "Handicapped" means suffering from physical disability, infirmity, malformation or disfigurement which is caused by bodily injury, birth defect or illness including epilepsy, and which shall include, but not be limited to, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment or physical reliance on a service or guide dog, wheelchair, or other remedial appliance or device, or from any mental, psychological or developmental disability resulting from anatomical, psychological, physiological or neurological conditions which prevents the normal exercise of any bodily or mental functions or is demonstrable, medically or psychologically, by accepted clinical or laboratory diagnostic techniques. Handicapped shall also mean suffering from AIDS or HIV infection.

r. "Blind person" means any individual whose central visual acuity does not exceed 20/200 in the better eye with correcting lens or whose visual acuity is better than 20/200 if accompanied by a limit to the field of vision in the better eye to such a degree that its widest diameter subtends an angle of no greater than 20 degrees.

s. "Guide dog" means a dog used to assist deaf persons or which is fitted with a special harness so as to

be suitable as an aid to the mobility of a blind person, and is used by a blind person who has satisfactorily completed a specific course of training in the use of such a dog, and has been trained by an organization generally recognized by agencies involved in the rehabilitation of the blind or deaf as reputable and competent to provide dogs with training of this type.

t. "Guide or service dog trainer" means any person who is employed by an organization generally recognized by agencies involved in the rehabilitation of the blind, handicapped or deaf as reputable and competent to provide dogs with training, and who is actually involved in the training process.

u. "Housing accommodation" means any publicly assisted housing accommodation or any real property, or portion thereof, which is used or occupied, or is intended, arranged, or designed to be used or occupied, as the home, residence or sleeping place of one or more persons, but shall not include any single family residence the occupants of which rent, lease, or furnish for compensation not more than one room therein.

v. "Public facility" means any place of public accommodation and any street, highway, sidewalk, walkway, public building, and any other place or structure to which the general public is regularly, normally or customarily permitted or invited.

w. "Deaf person" means any person whose hearing is so severely impaired that the person is unable to hear and understand normal conversational speech through the unaided ear alone, and who must depend primarily

on a supportive device or visual communication such as writing, lip reading, sign language, and gestures.

x. "Atypical hereditary cellular or blood trait" means sickle cell trait, hemoglobin C trait, thalassemia trait, Tay-Sachs trait, or cystic fibrosis trait.

y. "Sicke cell trait" means the condition wherein the major natural hemoglobin components present in the blood of the individual are hemoglobin A (normal) and hemoglobin S (sickle hemoglobin) as defined by standard chemical and physical analytic techniques, including electrophoresis; and the proportion of hemoglobin A is greater than the proportion of hemoglobin S or one natural parent of the individual is shown to have only normal hemoglobin components (hemoglobin A, hemoglobin A2, hemoglobin F) in the normal proportions by standard chemical and physical analytic tests.

z. "Hemoglobin C trait" means the condition wherein the major natural hemoglobin components present in the blood of the individual are hemoglobin A (normal) and hemoglobin C as defined by standard chemical and physical analytic techniques, including electrophoresis; and the proportion of hemoglobin A is greater than the proportion of hemoglobin C or one natural parent of the individual is shown to have only normal hemoglobin components (hemoglobin A, hemoglobin A2, hemoglobin F) in normal proportions by standard chemical and physical analytic tests.

aa. "Thalassemia trait" means the presence of the thalassemia gene which in combination with another similar gene results in the chronic hereditary disease Cooley's anemia.

bb. "Tay-Sachs trait" means the presence of the Tay-Sachs gene which in combination with another similar gene results in the chronic hereditary disease Tay-Sachs.

cc. "Cystic fibrosis trait" means the presence of the cystic fibrosis gene which in combination with another similar gene results in the chronic hereditary disease cystic fibrosis.

dd. "Service dog" means any dog individually trained to a handicapped person's requirements including, but not limited to, minimal protection work, rescue work, pulling a wheelchair or retrieving dropped items.

ee. "Qualified Medicaid applicant" means an individual who is a qualified applicant pursuant to P.L.1968, c. 413 (C.30:4D-1 et seq.).

ff. "AIDS" means acquired immune deficiency syndrome as defined by the Centers for Disease Control of the United States Public Health Service.

gg. "HIV infection" means infection with the human immunodeficiency virus or any other related virus identified as a probable causative agent of AIDS.

hh. "Affectional or sexual orientation" means male or female heterosexuality, homosexuality or bisexuality by inclination, practice, identity or expression, having a history thereof or being perceived, presumed or identified by others as having such an orientation.

ii. "Heterosexuality" means affectional, emotional or physical attraction or behavior which is primarily directed towards persons of the other gender.

jj. "Homosexuality" means affectional, emotional or physical attraction or behavior which is primarily directed towards persons of the same gender.

kk. "Bisexuality" means affectional, emotional or physical attraction or behavior which is directed towards persons of either gender.

ll. "Familial status" means being the natural parent of a child, the adoptive parent of a child, the foster parent of a child, having a "parent and child relationship" with a child as defined by State law, or having sole or joint legal or physical custody, care, guardianship, or visitation with a child, or any person who is pregnant or is in the process of securing legal custody of any individual who has not attained the age of 18 years.

mm. "Housing for older persons" means housing:

(1) provided under any State or federal program that the Attorney General determines is specifically designed and operated to assist elderly persons (as defined in the State or federal program); or

(2) intended for, and solely occupied by persons 62 years of age or older; or

(3) intended and operated for occupancy by at least one person 55 years of age or older per unit. In determining whether housing qualifies as housing for older persons under this subsection, the Attorney General shall adopt regulations which require at least the following factors:

(a) the existence of significant facilities and services specifically designed to meet the physical or social needs of older persons, or if the provision of such facilities and services is not practicable, that such housing is necessary to provide important housing opportunities for older persons; and

(b) that at least 80 percent of the units are occupied by at least one person 55 years of age or older per unit; and

(c) the publication of, and adherence to, policies and procedures which demonstrate an intent by the owner or manager to provide housing for persons 55 years of age or older.

Housing shall not fail to meet the requirements for housing for older persons by reason of: persons residing in such housing as of March 12, 1989 not meeting the age requirements of this subsection, provided that new occupants of such housing meet the age requirements of this subsection; or unoccupied units, provided that such units are reserved for occupancy by persons who meet the age requirements of this subsection.

10:5-12. Unlawful employment practice or unlawful discrimination

It shall be an unlawful employment practice, or, as the case may be, an unlawful discrimination:

a. For an employer, because of the race, creed, color, national origin, ancestry, age, marital status, affectional

or sexual orientation, sex or atypical hereditary cellular or blood trait of any individual, or because of the liability for service in the Armed Forces of the United States or the nationality of any individual, to refuse to hire or employ or to bar or to discharge or require to retire, unless justified by lawful considerations other than age, from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment; provided, however, it shall not be an unlawful employment practice to refuse to accept for employment an applicant who has received a notice of induction or orders to report for active duty in the armed forces; provided further that nothing herein contained shall be construed to bar an employer from refusing to accept for employment any person on the basis of sex in those certain circumstances where sex is a bona fide occupational qualification, reasonably necessary to the normal operation of the particular business or enterprise; provided further that nothing herein contained shall be construed to bar an employer from refusing to accept for employment or to promote any person over 70 years of age; provided further that it shall not be an unlawful employment practice for a club exclusively social or fraternal to use club membership as a uniform qualification for employment, or for a religious association or organization to utilize religious affiliation as a uniform qualification in the employment of clergy, religious teachers or other employees engaged in the religious activities of the association or organization, or in following the tenets of its religion in establishing and

utilizing criteria for employment of an employee; provided further, that it shall not be an unlawful employment practice to require the retirement of any employee who, for the two-year period immediately before retirement, is employed in a bona fide executive or a high policy-making position, if that employee is entitled to an immediate non-forfeitable annual retirement benefit from a pension, profit sharing, savings or deferred retirement plan, or any combination of those plans, of the employer of that employee which equals in the aggregate at least $27,000.00; and provided further that an employer may restrict employment to citizens of the United States where such restriction is required by federal law or is otherwise necessary to protect the national interest.

For the purposes of this subsection, a "bona fide executive" is a top level employee who exercises substantial executive authority over a significant number of employees and a large volume of business. A "high policy-making position" is a position in which a person plays a significant role in developing policy and in recommending the implementation thereof.

b. For a labor organization, because of the race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation or sex of any individual, or because of the liability for service in the Armed Forces of the United States or nationality of any individual, to exclude or to expel from its membership such individual or to discriminate in any way against any of its members, against any applicant for, or individual included in, any apprentice or other training program or against any employer or any individual employed by an employer; provided, however, that nothing herein contained shall

be construed to bar a labor organization from excluding from its apprentice or other training programs any person on the basis of sex in those certain circumstances where sex is a bona fide occupational qualification reasonably necessary to the normal operation of the particular apprentice or other training program.

c. For any employer or employment agency to print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for employment, or to make an inquiry in connection with prospective employment, which expresses, directly or indirectly, any limitation, specification or discrimination as to race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation or sex or liability of any applicant for employment for service in the Armed Forces of the United States, or any intent to make any such limitation, specification or discrimination, unless based upon a bona fide occupational qualification.

d. For any person to take reprisals against any person because that person has opposed any practices or acts forbidden under this act or because that person has filed a complaint, testified or assisted in any proceeding under this act or to coerce, intimidate, threaten or interfere with any person in the exercise or enjoyment of, or on account of that person having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by this act.

e. For any person, whether an employer or an employee or not, to aid, abet, incite, compel or coerce the

doing of any of the acts forbidden under this act, or to attempt to do so.

f. For any owner, lessee, proprietor, manager, superintendent, agent, or employee of any place of public accommodation directly or indirectly to refuse, withhold from or deny to any person any of the accomodations, advantages, facilities or privileges thereof, or to discriminate against any person in the furnishing thereof, or directly or indirectly to publish, circulate, issue, display, post or mail any written or printed communication, notice, or advertisement to the effect that any of the accommodations, advantages, facilities, or privileges of any such place will be refused, withheld from, or denied to any person on account of the race, creed, color, national origin, ancestry, marital status, sex, affectional or sexual orientation or nationality of such person, or that the patronage or custom thereat of any person of any particular race, creed, color, national origin, ancestry, marital status, sex, affectional or sexual orientation or nationality is unwelcome, objectionable or not acceptable, desired or solicited, and the production of any such written or printed communication, notice or advertisement, purporting to relate to any such place and to be made by any owner, lessee, proprietor, superintendent or manager thereof, shall be presumptive evidence in any action that the same was authorized by such person; provided, however, that nothing contained herein shall be construed to bar any place of public accommodation which is in its nature reasonably restricted exclusively to individuals of one sex, and which shall include but not be limited to any summer camp, day camp, or resort camp, bathhouse,

dressing room, swimming pool, gymnasium, comfort station, dispensary, clinic or hospital, or school or educational institution which is restricted exclusively to individuals of one sex, from refusing, withholding from or denying to any individual of the opposite sex any of the accommodations, advantages, facilities or privileges thereof on the basis of sex; provided further, that the foregoing limitation shall not apply to any restaurant as defined in R.S.33:1-1 or place where alcoholic beverages are served.

g. For the owner, lessee, sublessee, assignee or managing agent of, or other person having the right of ownership or possession of or the right to sell, rent, lease, assign, or sublease any real property or part or portion thereof, or any agent or employee of any of these:

(1) To refuse to sell, rent, lease, assign, or sublease or otherwise to deny to or withhold from any person or group of persons any real property or part or portion thereof because of the race, creed, color, national origin, ancestry, marital status, affectional or sexual orientation, familial status or nationality of such person or group of persons;

(2) To discriminate against any person or group of persons because of the race, creed, color, national origin, marital status, sex, affectional or sexual orientation or familial status of such person or group of persons in the terms, conditions or privileges of the sale, rental, or lease of any real property or part or portion thereof or in the furnishing of facilities or services in connection therewith; or

(3) To print, publish, circulate, issue, display, post, or mail, or cause to be printed, published, circulated, issued, displayed, posted or mailed any statement, advertisement, publication or sign, or to use any form of application for the purchase, rental, lease, assignment, or sublease of any real property or part or portion thereof or to make any record or inquiry in connection with the prospective purchase, rental, lease, assignment, or sublease of any real property, or part or portion thereof which expresses, directly or indirectly, any limitation, specification or discrimination as to race, creed, color, national origin, ancestry, marital status, sex, affectional or sexual orientation, familial status or nationality, or any intent to make any such limitation, specification or discrimination, and the production of any such statement, advertisement, publicity, sign, form of application, record, or inquiry purporting to be made by any such person shall be presumptive evidence in any action that the same was authorized by such person; provided, however, that nothing contained in this subsection shall be construed to bar any person from refusing to sell, rent, lease, assign or sublease or from advertising or recording a qualification as to sex for any room, apartment, flat in a dwelling or residential facility which is planned exclusively for and occupied by individuals of one sex to any individual of the exclusively opposite sex on the basis of sex.

h. For any person, including but not limited to, any real estate broker, real estate salesperson, or employee or agent thereof:

(1) To refuse to sell, rent, assign, lease or sublease, or offer for sale, rental, lease, assignment, or sublease any

real property or part or portion thereof to any person or group of persons or to refuse to negotiate for the sale, rental, lease, assignment, or sublease of any real property or part or portion thereof to any person or group of persons because of the race, creed, color, national origin, ancestry, marital status, familial status, sex, affectional or sexual orientation or nationality of such person or group of persons, or to represent that any real property or portion thereof is not available for inspection, sale, rental, lease, assignment, or sublease when in fact it is so available, or otherwise to deny or withhold any real property or any part or portion of facilities thereof to or from any person or group of persons because of the race, creed, color, national origin, ancestry, marital status, familial status, sex, affectional or sexual orientation or nationality of such person or group of persons;

(2) To discriminate against any person because of his race, creed, color, national origin, ancestry, marital status, familial status, sex or affectional or sexual orientation in the terms, conditions or privileges of the sale, rental, lease, assignment or sublease of any real property or part or portion thereof or in the furnishing of facilities or services in connection therewith; or

(3) To print, publish, circulate, issue, display, post, or mail, or cause to be printed, published, circulated, issued, displayed, posted or mailed any statement, advertisement, publication or sign, or to use any form of application for the purchase, rental, lease, assignment, or sublease of any real property or part or portion thereof or to make any record or inquiry in connection with the prospective purchase, rental, lease, assignment, or sublease of any real property or part or portion thereof

which expresses, directly or indirectly, any limitation, specification or discrimination as to race, creed, color, national origin, ancestry, marital status, familial status, sex, affectional or sexual orientation or nationality or any intent to make any such limitation, specification or discrimination, and the production of any such statement, advertisement, publicity, sign, form of application, record, or inquiry purporting to be made by any such person shall be presumptive evidence in any action that the same was authorized by such person; provided, however, that nothing contained in this subsection h., shall be construed to bar any person from refusing to sell, rent, lease, assign or sublease or from advertising or recording a qualification as to sex for any room, apartment, flat in a dwelling or residential facility which is planned exclusively for and occupied exclusively by individuals of one sex to any individual of the opposite sex on the basis of sex.

i. For any person, bank, banking organization, mortgage company, insurance company or other financial institution, lender or credit institution to whom application is made for any loan or extension of credit including but not limited to an application for financial assistance for the purchase, acquisition, construction, rehabilitation, repair or maintenance of any real property or part or portion thereof or any agent or employee thereof:

(1) To discriminate against any person or group of persons because of the race, creed, color, national origin, ancestry, marital status, sex, affectional or sexual orientation or nationality of such person or group of persons or

of the prospective occupants or tenants of such real property or part or portion thereof, in the granting, withholding, extending, modifying or renewing, or in the fixing of the rates, terms, conditions or provisions of any such loan, extension of credit or financial assistance or in the extension of services in connection therewith; or

(2) To use any form of application for such loan, extension of credit or financial assistance or to make record or inquiry in connection with applications for any such loan, extension of credit or financial assistance which expresses, directly or indirectly, any limitation, specification or discrimination as to race, creed, color, national origin, ancestry, marital status, sex, affectional or sexual orientation or nationality or any intent to make any such limitation, specification or discrimination; unless otherwise required by law or regulation to retain or use such information; or

(3) To discriminate on the basis of familial status in any manner described in paragraph (1) or (2) of this subsection with respect to any real property.

j. For any person whose activities are included within the scope of this act to refuse to post or display such notices concerning the rights or responsibilities of persons affected by this act as the Attorney General may by regulation require.

k. For any real estate broker, real estate salesperson or employee or agent thereof or any other individual, corporation, partnership, or organization, for the purpose of inducing a transaction for the sale or rental of real property from which transaction such person or any of its members may benefit financially, to represent that a

change has occurred or will or may occur in the composition with respect to race, creed, color, national origin, ancestry, marital status, familial status, sex, affectional or sexual orientation or nationality of the owners or occupants in the block, neighborhood or area in which the real property is located, and to represent, directly or indirectly, that this change will or may result in undesirable consequences in the block, neighborhood or area in which the real property is located, including, but not limited to the lowering of property values, an increase in criminal or anti-social behavior, or a decline in the quality of schools or other facilities.

l. For any person to refuse to buy from, sell to, lease from or to, license, contract with, or trade with, provide goods, services or information to, or otherwise do business with any other person on the basis of the race, creed, color, national origin, ancestry, age, sex, affectional or sexual orientation, marital status, liability for service in the Armed Forces of the United States, or nationality of such other person or of such other person's spouse, partners, members, stockholders, directors, officers, managers, superintendents, agents, employees, business associates, suppliers, or customers. This subsection shall not prohibit refusals or other actions (1) pertaining to employee-employer collective bargaining, labor disputes, or unfair labor practices, or (2) made or taken in connection with a protest of unlawful discrimination or unlawful employment practices.

m. For any person to:

(1) Grant or accept any letter of credit or other document which evidences the transfer of funds or credit,

or enter into any contract for the exchange of goods or services, where the letter of credit, contract, or other document contains any provisions requiring any person to discriminate against or to certify that he, she or it has not dealt with any other person on the basis of the race, creed, color, national origin, ancestry, age, sex, affectional or sexual orientation, marital status, liability for service in the Armed Forces of the United States, or nationality of such other person or of such other person's spouse, partners, members, stockholders, directors, officers, managers, superintendents, agents, employees, business associates, suppliers, or customers.

(2) Refuse to grant or accept any letter of credit or other document which evidences the transfer of funds or credit, or refuse to enter into any contract for the exchange of goods or services, on the ground that it does not contain such a discriminatory provision or certification.

The provisions of this subsection shall not apply to any letter of credit, contract, or other document which contains any provision pertaining to employee-employer collective bargaining, a labor dispute or an unfair labor practice, or made in connection with the protest of unlawful discrimination or an unlawful employment practice, if the other provisions of such letter of credit, contract, or other document do not otherwise violate the provisions of this subsection.

n. For any person to aid, abet, incite, compel, coerce, or induce the doing of any act forbidden by subsections *l.* and m. of section 11 of P.L.1945, c. 169 (C.

10:5-12), or to attempt, or to conspire to do so. Such prohibited conduct shall include, but not be limited to:

(1) Buying from, selling to, leasing from or to, licensing, contracting with, trading with, providing goods, services, or information to, or otherwise doing business with any person because that person does, or agrees or attempts to do, any such act or any act prohibited by this subsection n.; or

(2) Boycotting, commercially blacklisting or refusing to buy from, sell to, lease from or to, license, contract with, provide goods, services or information to, or otherwise do business with any person because that person has not done or refuses to do any such act or any act prohibited by this subsection n.; provided that this subsection n. shall not prohibit refusals or other actions either pertaining to employee-employer collective bargaining, labor disputes, or unfair labor practices, or made or taken in connection with a protest of unlawful discrimination or unlawful employment practices.

10:5-13. Remedies; filing complaint; prosecution of suit in Superior Court

Any person claiming to be aggrieved by an unlawful employment practice or an unlawful discrimination may, personally or by an attorney-at-law, make, sign and file with the division a verified complaint in writing which shall state the name and address of the person, employer, labor organization, employment agency, owner, lessee,

proprietor, manager, superintendent, or agent alleged to have committed the unlawful employment practice or unlawful discrimination complained of and which shall set forth the particulars thereof and shall contain such other information as may be required by the division. Upon receipt of the complaint, the division shall notify the complainant on a form promulgated by the director of the division and approved by the Attorney General of the complainant's rights under this act, including the right to file a complaint in the Superior Court to be heard before a jury; of the jurisdictional limitations of the division; and any other provisions of this act, without interpretation, that may apply to the complaint. The Commissioner of Labor, the Attorney General, or the Commissioner of Education may, in like manner, make, sign and file such complaint. Any employer whose employees, or some of them, refuse or threaten to refuse to co-operate with the provisions of this act, may file with the division a verified complaint asking for assistance by conciliation or other remedial action.

Any complainant may initiate suit in Superior Court under this act without first filing a complaint with the division or any municipal office. Upon the application of any party, a jury trial shall be directed to try the validity of any claim under this act specified in the suit. All remedies available in common law tort actions shall be available to prevailing plaintiffs. These remedies are in addition to any provided by this act or any other statute. Prosecution of such suit in Superior Court under this act shall bar the filing of a complaint with the division or any municipal office during the pendency of any such suit.

At any time after 180 days from the filing of a complaint with the division, a complainant may file a request with the division to present the action personally or through counsel to the Office of Administrative Law. Upon such request, the director of the division shall file the action with the Office of Administrative Law, provided that no action may be filed with the Office of Administrative Law where the director of the division has found that no probable cause exists to credit the allegations of the complaint or has otherwise dismissed the complaint.

A party to an action based upon a violation of this act shall mail a copy of the initial pleadings or claims, amended pleadings or claims, counterclaims, briefs, and legal memoranda to the division at the same time as filing such documents with the Office of Administrative Law or the court. Upon application to the Office of Administrative Law or to the court wherein the matter is pending, the division shall be permitted to intervene.

10:5-27.1 Attorneys fees

In any action or proceeding brought under this act, the prevailing party may be awarded a reasonable attorney's fee as part of the cost, provided however, that no attorney's fee shall be awarded to the respondent unless there is a determination that the charge was brought in bad faith.

Supreme Court, U.S.
FILED
DEC 4 1996
CLERK

No. 96-712

In The

Supreme Court of the United States

October Term, 1996

JOHN KAYE, Individually and in his capacity as Monmouth County Prosecutor; THE COUNTY PROSECUTOR'S OFFICE OF THE COUNTY OF MONMOUTH; JOHN DOES 1-100; JANE DOES 1-100

THE COUNTY OF MONMOUTH,
Intervenor in District Court,

Petitioners,

v.

BARBARA COLEMAN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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13 pp

COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

As discussed below, the questions presented in the instant petition by both the County of Monmouth and defendant John Kaye are based upon a fundamental disregard and mischaracterization of the holding of the Court of Appeals and prevailing legal principles in an attempt to catch the Court's attention. Ignoring the fact that the decision of the Court of Appeals rests upon a fact specific determination that the County of Monmouth waived any objection to jurisdiction in the case at bar by entering an appearance and actually participating in this matter, the County attempts to create the appearance of some constitutional question resulting from the imposition of liability upon the County when, in fact, there is none. In addition to the particularly fact sensitive nature of the court's determination in the case at bar, the Third Circuit's decision imposing liability on the County under New Jersey state law was based upon, and is consistent with, a proper application of and adherence to the applicable legal principles.

As to the remaining questions presented relating to the Third Circuit's decision affirming the jury's award of damages against Kaye under 42 *U.S.C.* § 1983, the petitioners similarly mischaracterize the basis for the jury's verdict, as well as the law, conveying the misimpression that the decision of the Court of Appeals allegedly presents a great question of public significance and is allegedly in conflict with other federal precedent.

The counter-statement of questions presented is as follows:

COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW – Continued

1. Whether this Court should decline to exercise jurisdiction where the Third Circuit found that the County of Monmouth was liable in the case at bar for the acts of Prosecutor John Kaye under state law, where that finding was based upon a fact specific determination that the County entered an appearance and actually participated and defended its interests as a party from the inception of plaintiff's complaint through trial without objection and actually agreed to submit the issue of its own liability to the jury.

2. Whether this Court should decline to exercise jurisdiction as to the Third Circuit's decision finding that the County of Monmouth was liable for the acts of County Prosecutor John Kaye when the Third Circuit applied New Jersey law to find that the New Jersey Supreme Court would impose liability on the County for the discriminatory employment practices of County Prosecutor John Kaye.

3. Whether this Court should decline to exercise jurisdiction where the Third Circuit found that the jury award of compensatory damages to plaintiff against John Kaye under 42 *U.S.C.* § 1983 was properly based upon the evidence at trial and where the decision is consistent with the law as stated by this Court's precedent and has been uniformly understood and applied by the other courts that have addressed the issue.

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COUNTER-STATEMENT OF THE CASE

The plaintiff Barbara Coleman was employed as an investigator with the Monmouth County Prosecutor's Office ("MCPO"). After being passed over for promotion on three (3) consecutive occasions by equally or less-qualified males, and as a result of the failure of the Monmouth County Prosecutor John Kaye to respond to repeated written requests for an opportunity to discuss the situation, Ms. Coleman was forced to file a complaint of gender discrimination with the United States Equal Employment Opportunity Commission. After obtaining a right to sue on March 12, 1991, plaintiff filed a complaint in United States District Court for the District of New Jersey against John Kaye, individually and in his capacity as Monmouth County Prosecutor, the County Prosecutor's Office of the County of Monmouth, John Does 1-100 and Jane Does 1-100, alleging, *inter alia*, that they discriminated against her based upon her gender by failing to promote her to various positions in 1989 and 1990. The Summons and Complaint was served upon John Kaye, individually and in his capacity as Monmouth County Prosecutor. (A-4) Prosecutor Kaye also accepted service of the complaint on behalf of the MCPO. (A-4)

Contrary to the impression which the County seeks to convey, the County, at all times, recognized that it had an interest in the outcome of this lawsuit and was able to protect its pecuniary interests. As early as the institution of plaintiff's complaint with the EEOC, the County recognized its liability, as plaintiff's employer, for the acts of John Kaye and his subordinates and stepped in to respond to the allegations. In response to the questionnaire forwarded by the EEOC to the MCPO in response to plaintiff's complaint, Assistant County Counsel for the

County of Monmouth, Robert Hrebek, wrote to the EEOC and advised that he had "been assigned to handle the above inquiry" by Malcolm V. Carton, Esq., ***Monmouth County Counsel***. (A-10) Mr. Hrebek directed that all future correspondence be directed to his attention "as ***Assistant County Counsel***." (A-11) The County was kept informed of the charges. In fact, a copy of that letter was sent to Frederica Brown, Monmouth County Personnel Officer.

Even after the filing of plaintiff's complaint in district court, the County continued to participate in court proceedings and filed papers on behalf of the County. In a memorandum to the district court dated January 3, 1991, Special County Counsel, Richard T. O'Connor noted that "[t]he ***County of Monmouth*** shall rely upon the legal arguments and contentions contained in its supporting brief."

In April 1991, ***Assistant County Counsel*** Hrebek applied to the district court for an Order specifically granting the defendant Monmouth County Prosecutor's Office a thirty (30) day extension to file an Answer or responsive pleading. The letter listed Mr. Hrebek as "Attorney for Defendants." (A-12)

In May 1991, Gerald Dorf, Esq. entered an appearance on behalf of John Kaye "as an individual." Dorf was retained by Kaye with Monmouth County funds. (A-12) On that same day, Assistant County Counsel Hrebek, received an additional fifteen (15) day extension to file an Answer on behalf of defendant MCPO and defendant John Kaye, as Monmouth County Prosecutor. (A-12) The defense of lack of personal jurisdiction with respect to the

County was not interposed in any of the responsive pleadings. (A-11)

Special County Counsel O'Connor, wrote to plaintiff's counsel in March 1992 expressly recognizing the County's participation in the instant matter by stating as follows: "As you know, ***I represent Monmouth County in the above captioned matter.***" (A-12)

In or about August 1992, Mr. Dorf filed an Answer on behalf of defendant John Kaye, as an individual. The following day, Special County Counsel O'Connor for the County of Monmouth, filed an Answer on behalf of the County Prosecutor's Office for the County of Monmouth. Mr. O'Connor was specifically authorized by Malcolm Carton, Esq., ***Monmouth County Counsel,*** to file an Answer on behalf of John Kaye and the County Prosecutor's Office of the County of Monmouth.

In December 1992, Assistant County Counsel O'Connor stated that the "***County*** would be willing to pay some money – essentially an amount to cover reasonable legal fees and expenses to date and is agreeable that there will be no discrimination against your client."

On August 12, 1993, a joint representation agreement was signed by "Richard T. O'Connor, Special County Counsel for Malcolm V. Carton, Monmouth County Counsel" and by Gerald Dorf, Esq. and was filed with the court on behalf of all defendants. (A-11) On that same day, Special County Counsel, Mr. O'Connor requested the clerk to "enter the appearance of the firms of Gerald L. Dorf, P.C. and Malcolm V. Carton, Monmouth County Counsel, by Richard T. O'Connor, Special County Counsel, on behalf of Defendant John Kaye individually and in his Capacity as Monmouth County Prosecutor and the

County Prosecutor's Office of the County of Monmouth in the above captioned matter." (A-11)

During the three years and seven months of litigation, from 1991 to 1994, the County participated in all phases of pre-trial discovery, motions, court appearances and continued to represent and defend the ***County's*** interests. Moreover, the County was obviously aware of its interest in this lawsuit as is evidenced by its retention of counsel to represent both John Kaye and the Prosecutor's Office and payment of all legal fees for the defense of both Prosecutor Kaye and the MCPO.

Following a seven-day trial before Judge Brown in September 1994, counsel for both plaintiff ***and*** defendants, together with the court, drafted the jury charges and interrogatories, expressly recognizing that the County ***is*** vicariously liable for the acts of John Kaye and/or his subordinates under principles of *respondeat superior*. Recognizing the liability of the County of Monmouth as plaintiff's employer for the acts of John Kaye and agents of the MCPO, the charges accurately stated as follows:

> The County is an "employer" under this statute [N.J.S.A. 10:5-1, *et seq.*] Under state law, the County is legally responsible for any gender discrimination committed by its employees in the performance of their duties. This is known as the doctrine of respondeat superior. Thus, the County as an employer is legally responsible for any acts of intentional discrimination committed by its employees which proximately caused the failure to promote Investigator Coleman in May 1989, June 1990, and/or October 1990 because she was a woman, whether such discrimination

> was by Kaye or by one of his subordinates who made recommendations to Kaye.
>
> . . .
>
> The County, under the doctrine of respondeat superior, is liable for any intentional discrimination by its employees which resulted in plaintiff's non-promotion and for any pain, suffering, humiliation and mental anguish which this discrimination proximately caused her.

Based upon the evidence presented at trial, the jury deliberated and found that (1) Prosecutor John Kaye intentionally discriminated against plaintiff based upon her gender by not promoting her to Sergeant in June 1990 and October 1990; and (2) Prosecutor John Kaye and/or one or more of his subordinates who made recommendations to him intentionally discriminated against plaintiff in May 1989, June 1990 and October 1990. (A-4) The jury awarded plaintiff $15,000 against the County for compensatory damages and $10,000 in compensatory damages against Kaye. Based upon the compelling evidence of the egregious and reprehensible nature of the defendants' actions, including the many lies and efforts to hide the discrimination, as well as the willful disregard of plaintiff's pleas to remediate the discrimination, the jury also awarded $50,000 in punitive damages against Kaye and $350,000 in punitive damages against the County of Monmouth.[1]

After almost four (4) years of litigation and two weeks of trial, and, as recognized by the Court of Appeals

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[1] The petitioners have never appealed or raised in the district court or Court of Appeals the amount of punitive damages as being excessive.

"seemingly as an afterthought," (A-13) the County filed a motion to "intervene" and vacate the judgment in the above matter. (A-5) Although the County indisputably knew about the litigation since its inception and despite the fact that ***County Counsel*** actually served as co-counsel for John Kaye and the Prosecutor's Office in this very matter, the County sought to vacate the verdict on the basis that the County was not served with a copy of the Summons and Complaint. The defendants John Kaye and the MCPO filed a motion pursuant to Fed. R. Civ. P. 50(b) seeking judgment notwithstanding the verdict or, in the alternative, a new trial. (A-6-7)

Notwithstanding the fact that the County had consented to submit the issue of its own liability to the jury, by Order dated May 4, 1995, Judge Brown granted the County's motion and vacated the verdict and award of $15,000 in compensatory damages and $350,000 in punitive damages against the County finding that the verdict against the County could not stand because the County was not served with the summons and complaint. (A-7)

Alternatively, the court found that the County could not be held liable under a theory of *respondeat superior* for the acts of Prosecutor John Kaye under state law. (A-6) Plaintiff appealed the decision vacating the verdict and Kaye cross-appealed from the district court's decision affirming the jury verdict against him. The Court of Appeals reversed the decision of the district court vacating the jury's verdict as against the County and affirmed the jury's verdict against Kaye.

CORRECTIONS OF MISSTATEMENTS IN THE PETITION

Pursuant to United States Supreme Court Rule 15.1, respondents bring the following misstatements of fact contained within the petition to the Court's attention:

Petitioners' statement regarding the notice to and role played by the County not only omits virtually all of the evidence relied upon by the Court of Appeals in reaching their fact specific determination that the County waived any objection to jurisdiction, it is also grossly misleading. Furthermore, as stated previously, petitioners' statement that the County of Monmouth was not referred to in the body of the Complaint is simply not true. As recognized by the Court of Appeals, in addition to the fact that the County entered an appearance in this matter, it is undisputed that the complaint named the County Prosecutor's Office of the County of Monmouth.

Also misleading is the petitioners' assertion that the complaint was served on "Kaye only." While petitioners correctly note that the Court of Appeals acknowledged that service on Kaye does not constitute service on the County, the petitioners fail to apprise the Court that the complaint was served upon and accepted by Kaye in his individual capacity and also in his official capacity as County Prosecutor for the County of Monmouth, as well as the abundant evidence of both notice to the County and the actual participation of the County in the proceedings below.

The County's characterization of the district court's submission of a charge and interrogatory to the jury naming the County of Monmouth as being "inexplicable" ignores the evidence proffered to the Court of Appeals

that the counsel specifically retained by the County in this matter actually participated in drafting those charges and interrogatories and agreed to submit the issue of the County's liability to the jury.[2]

The County's assertion, as fact, that after learning of the jury's verdict the County moved in the trial court to intervene and vacate the verdict because "the County had not been a party" is factually wrong and disregards the specific finding of the Court of Appeals that the County was, indeed, a party. Petitioners' suggestion that the County did not have the opportunity to defend its interests and that it never participated in any of the trial proceedings is simply untrue.

Also misleading is the County's attempt to characterize the Third Circuit's finding that the County was a party as being based upon "largely certain correspondence from and documents filed on behalf of the Monmouth County Prosecutor's Office." The Court of Appeals found that the County itself had entered an appearance and had actually participated in all phases of the litigation process in defending its interests. The finding of the Court of Appeals that the County's interests were "indistinguishable from those of the MCPO," which petitioners assert was "legally incorrect," was properly based upon a fact specific consideration and evaluation of the participation by the County in the case at bar.

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[2] Perhaps the inability of the County's appeal counsel to understand or explain the charges and jury interrogatories is due to the fact that unlike respondent's appeal counsel, the County's appeal counsel did not participate in the proceedings below or at trial.

Also incorrect is the petitioners' characterization that the jury's award of compensatory damages was not supported by a "single shred of objective corroboration, either through her own testimony or otherwise. . . . "

Finally, the petitioners' assertion that there is some alleged conflict among the Court of Appeals with respect to the type of evidence necessary to support the recovery of damages under 42 *U.S.C.* § 1983 for emotional distress is factually untrue and is simply designed to create a basis for jurisdiction where there is none. As demonstrated herein, even the very cases cited by petitioners demonstrate that the circuits and district courts have universally understood and applied the same standards.

As discussed below, this petition fails to satisfy any of the standards that this Court has mandated will govern the court's exercise of discretion in favor of granting certiorari. This petition simply represents defendants' dissatisfaction with the decision of the Court of Appeals and nothing more.

POINT I

THIS COURT SHOULD DECLINE TO ENTERTAIN JURISDICTION AS TO PETITIONERS' CLAIMS RELATING TO THE COUNTY OF MONMOUTH.

1. This Court Should Decline Jurisdiction Because There Is An Independent Factual Basis For The Decision Of The Court Of Appeals.

By way of the instant motion, petitioners utilize the certiorari procedure to assert, for the first time, that the decision of the court of appeals, applying state law, raises alleged constitutional concerns relating to due process

resulting from the jury's verdict imposing damages against the County in the case at bar. None of these alleged constitutional issues were raised in the trial court, following trial or in post-trial motions, in the motion by the County of Monmouth to intervene and vacate the verdict, in any of the appeal papers filed in the four consolidated appeals or at oral argument.[3] More importantly, however, the decision of the Court of Appeals is based upon an independent fact specific determination and should not be disturbed.

It is well established that this Court has refused to decide constitutional questions when other grounds for the decision can be found in the record. *Neese v. Southern Railway Co.*, 350 *U.S.* 77 (1955). Where it appears that the judgment might have rested upon a non-federal ground, this Court has recognized it inappropriate to take jurisdiction. *Hedgebeth v. North Carolina*, 334 *U.S.* 806 (1948); *Woods v. Nierstheimer*, 328 *U.S.* 211 (1946); *White v. Ragen*, 324 *U.S.* 760 (1945); *McGoldrick v. Gulf Oil Corp.*, 309 *U.S.* 2 (1940); *Woolsey v. Best*, 299 *U.S.* 1 (1936); *Lynch v. NY Pierson*, 293 *U.S.* 52 (1934); *Cuyahoga Power Co. v. Northern Realty Co.*, 244 *U.S.* 300 (1917); *Adams v. Russell*, 229 *U.S.* 353 (1913).

In the case at bar, the decision of the Court of Appeals was based upon an independent fact specific determination that the County of Monmouth voluntarily entered an appearance and actively defended themself against plaintiff's claims from the inception of plaintiff's

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[3] Although those issues were never raised in any of the four (4) consolidated appeals, petitioners did belatedly attempt to raise these issues in their petition for rehearing and suggestion for rehearing *en banc* which was denied.

complaint through almost four (4) years of litigation and even expressly submitted the issue of its own liability to the jury for determination at trial. Ignoring or disregarding that finding, the County seeks to utilize this procedure to, once again, argue that it has no ability to control the personnel decisions of the County Prosecutor.

Notwithstanding the County's assertion that, as a general principle, imposing liability on a County for the acts of a County Prosecutor raises alleged constitutional questions (which it does not), an independent basis exists for the court's decision in the case at bar. Despite the County's attempt to reargue in this petition it did not have an opportunity to defend its interest in the proceedings below, the Court of Appeals found that it had.

The court specifically found that the County had "submitted itself to the jurisdiction of the district court, thereby waiving any claim that the district court lacked *in personam* jurisdiction." (A. 10) The Court of Appeals found that the County of Monmouth actively participated in both pre-complaint and post-complaint activities, including more than four (4) years of litigation. The County of Monmouth, through County Counsel, represented the interests of the County on the charge of discrimination initially filed by Ms. Coleman with the Equal Employment Opportunity Commission and also, recognized its liability for plaintiff's claims as stated in her complaint and had notice of, responded to and actively defended the County's interests through the litigation and trial. (A-10-13) The County of Monmouth specifically retained separate counsel to represent John Kaye in his individual capacity and ultimately entered into a joint representation agreement with Kaye's counsel, agreeing to let him represent the interests of the County at trial.

The County of Monmouth paid for all costs associated with the defense of the litigation and has also represented that it would be paying for the entire judgment including the judgment against Kaye.

The County's assertion that the County was not a party, filed no motions, did not participate in discovery and trial is both factually wrong and contrary to the express findings of the Court of Appeals. The Court of Appeals noted that at no time did representatives from the County Counsel's office ever object to jurisdiction as required by Rule 12(b)(1). Rather, the court found that to the contrary, attorneys from the County Counsel's office indicated that Monmouth County was actively aware of its possible exposure in this matter. (A-11)

Contrary to the County's assertion, the Court of Appeals' determination was not based "primarily" on "certain documents that pertained to the representation of the County Prosecutor's Office of the County of Monmouth." Also incorrect is the County's assertion that there was "no argument regarding the effect of these documents in either the district court or the Court of Appeals."

What the Court of Appeals did find is that correspondence from Special County Counsel contained ***admissions*** that the County was both a party ***and*** was represented in this matter. (A-12) In addition, the court found that Assistant County Counsel had represented himself as being attorney for defendants and had filed papers and motions in this action on behalf of Kaye and the MCPO. Assistant County Counsel did not object to lack of personal jurisdiction with respect to the County of Monmouth in any one of the responsive pleadings. (A-12)

Finally, the court recognized that the County, with County funds, had retained separate counsel to represent John Kaye as an individual. The court found that "[g]iven the County's pervasive involvement in the litigation of this matter and the County Counsel's Office's open acknowledgment that it was representing the County's interests, which by all appearances were indistinguishable from those of the MCPO . . . we conclude that Monmouth County's defense of lack of personal jurisdiction had effectively been waived long before the County, seemingly as an afterthought, filed its post-trial motion to vacate on jurisdictional grounds." (A-13) The court concluded that "the County of Monmouth was properly before the district court as a party." (A-13)

Because an independent factual basis exists for the finding of the Court of Appeals that the County is liable in the case at bar, this Court should decline to exercise jurisdiction.

2. The Petition Fails To Present Any Constitutional Or Federal Question As To The County's Liability.

Notwithstanding the fact that the Court of Appeals specifically found that the County was a party to the litigation and actively participated and defended its interests throughout the entire course of proceedings, the County argues that its due process rights were violated because it asserts it was not a party to the litigation until after the jury rendered its verdict. Based upon the County's disregard of the factual determination made by the Court of Appeals, the County asserts that the court's decision conflicts with this Court's precedent in *Richards v. Jefferson County, Ala.*, 135 *L.Ed.* 2d 76, 116 *S.Ct.* 1761

(1996). However, the court's decision imposing liability on the County does not violate the County's constitutional right to due process.

First, as noted above, the Court of Appeals found that the County voluntarily submitted to the jurisdiction, had notice and actively participated and defended its interests from the inception of plaintiff's complaint through trial. It is well established that even if an individual is not named as a party of record, he/she may be liable for the judgment if they participated in the suit or had an opportunity to be heard. *See Louisville & Nashville Railroad Co. v. Schmidt*, 177 *U.S.* 230 (1990); *Capo v. C-O Two Five Equipment Co.*, 93 *F.Supp.* 4 (*D.N.J.* 1950); *Miller v. Meadley*, 109 *N.J.* Eq. 436, 445 (Ch. 1932), 158 *A.* 118, *aff'd*, 112 N. J. Eq. 89 (E&A 1933), 163 *A.* 665 (1933). The New Jersey courts have recognized that the critical components of due process are adequate notice, opportunity for a fair hearing and availability of appropriate review. *Schneider v. City of East Orange*, 196 *N.J.* Super. 587, 595 (App. Div.), 483 *A.*2d 89 (1984) (*citing In re Suspension of Heller*, 374 *A.*2d 1191, 73 *N.J.* 292 (1977)), *aff'd*, 103 *N.J.* 115, 510 *A.*2d 1118, *cert. denied*, 479 *U.S.* 824 (1986)).

Moreover, even as a general principle, the imposition of liability on the County, despite the fact that they are unable to control the prosecutor's conduct, does not violate constitutional principles. First, even Mr. Carton, Monmouth County Counsel, "strongly disagrees with the part of the Brown Decision [the district court decision] vacating the verdict against the County that says 'State, not county officials, control the County Prosecutor.' " In an article that appeared in the New Jersey Law Journal on

May 15, 1995, Mr. Carton himself conceded that the Prosecutor "is not under the Attorney General as many people think." Mr. Carton further stated that "[i]n fact, prosecutors are paid by the County in which they work, and Kaye's defense was paid by Monmouth County." (Resp. App. 1-3)

Moreover, the finding of the Court of Appeals that the County is liable for the acts of County Prosecutor Kaye is not unprecedented and, in fact, is consistent with decisions by numerous other courts which have recognized that a political subdivision, such as a County, may be liable for the unlawful actions of an independent constitutional officer under principles of respondeat superior even if the County has no ability to control their conduct. *See Holda v. County of Kane*, 88 *Ill.App.* 3d 522, 410 *N.E.* 2d 522 (Ill.App.Ct. 1980) (finding the county was properly held vicariously liable for negligent acts of the sheriff, an independent constitutional officer, notwithstanding the fact that the county had no power to supervise, direct or control the actions of the sheriff.); *Drake v. City of Rochester*, 96 *Misc.* 2d 86, 94-97 (N.Y.Sup.Ct.), 408 *N.Y.S.* 2d 847, 853-856 (1978) (finding that the defendant County was vicariously liable for the unlawful acts of the county district attorney, a constitutional officer.)

In *Holda v. County of Kane*, the court found that the County was properly liable for the unlawful acts of the sheriff, an independent constitutional officer. *Holda*, 410 *N.E.* 2d at 559-560. The court rejected defendants' assertion that the County could not be liable because they had no power to supervise, direct or control the actions of the sheriff. In doing so, the court noted that the "control" test is merely one of a number of justifications offered for the

vicarious liability theory doctrine of *respondeat superior*. *Id.* at 560 (*citing* Prosser, Torts § 69 at 459 (4th Ed. 1971)). The court noted that while the degree to which the employee is subject to the control of the employer remains an important consideration in determining whether an employer will be held liable for the employee's actions on a vicarious liability theory, the absence of direct control does not, *ipso facto*, negate liability. The court found that this is particularly true with respect to a county officer, such as the sheriff, whose actions and duties involve a great deal of discretion but yet are performed entirely on behalf of the County. *Id.*

None of the cases cited by respondents compel a conclusion that the County's rights were violated. In *Richards v. Jefferson County*, petitioners filed a state court class action claiming the county's occupation tax violated the federal and Alabama constitutions. The State Supreme Court found that plaintiff's state claims were barred by a prior adjudication of the tax in an action that had been brought by Birmingham's Finance Division and the city itself consolidated with a suit by three county taxpayers. This Court held that because petitioners did not receive notice or sufficient representation in the prior litigation, that litigation could not bar them from pursuing their claims. *Richards*, 116 *S.Ct.* at 1761.

It is interesting that the County fails to point out this Court's reference in *Richards* to the decision in *Montana v. U.S.*, 440 *U.S.* 147 (1979). There, this Court held that even when non-parties assume control over litigation in which they have a direct financial or proprietary interest, they cannot be said to be "strangers to the cause" noting that "[one] who . . . defends a suit in the name of another to establish and protect his own right, or who assists in

the . . . defense of an action in aid of some interest of his own . . . is as much bound . . . as he would be if he had been a party to the record." *Richards*, 440 *U.S.* at 154; (*quoting Souffront v. La Compagnie des Sucreries*, 217 *U.S.* 475, 486-487 (1910)); *See also Schnell v. Peter Eckrich & Sons, Inc.*, 365 *U.S.* 260, 262 n.4 (1961).

The County also relies upon the Court's decision in *Morrissey v. Brewer*, 408 *U.S.* 471 (1972), for the proposition that the County had the right to an opportunity to be heard in a meaningful manner and at a meaningful time. Not only did the Court of Appeals in the case at bar find that the County did have an opportunity to be heard, it found that it ***actually participated*** in the proceedings below. Moreover, aside from the general and broad propositions regarding due process, this Court's decision in *Morrissey* discussed the rights of criminal defendant parolee at a parole revocation hearing and is factually distinguishable and inappropriate in analyzing the rights of the County in the case at bar.

The County also relies upon this Court's decision in *Martin v. Wilks*, 490 *U.S.* 755 (1989) and *Hansberry v. Lee*, 311 *U.S.* 32 (1940). In *Martin*, a group of white firefighters challenged certain alleged discriminatory hiring practices in favor of black individuals. The defendants argued that the hiring decisions were made in favor of black individuals on the basis of race in reliance upon a consent decree entered years earlier and that the plaintiffs were barred by virtue of the consent decree from challenging those actions.

This Court found that the white firefighters were not precluded from challenging the employment decisions

taken pursuant to the consent decree to which the plaintiffs were not a party. This Court found that defendants were required to have joined plaintiffs as mandatory parties in the prior proceeding rather than requiring them to intervene. Because the plaintiffs had not been joined and, therefore, did not have adequate notice or knowledge of the earlier suit, ***unlike the County in the case at bar,*** the Court found that the petitioners were not barred from pursuing their claims.[4] *Martin,* 490 *U.S.* at 765.

In *Hansberry v. Lee,* respondents, certain landowners, brought suit to enjoin certain other landowners from selling their land to Negroes in violation of an agreement restricting the sale of such land to non-Negroes. The respondents argued that to enforce the agreement against them would deprive them of due process because they were not party to the earlier agreement and therefore, were not bound by its decree.

This Court found that the plaintiffs were not bound by the prior agreement because, ***unlike the County in the case at bar,*** they had not been represented in the earlier litigation. The Court found that the landowners in the first suit did not seek to bind or affect the interests of the plaintiff landowners. *Hansberry,* 311 *U.S.* at 44-45. In doing so, the Court again noted the principle that one is not bound by a judgment in personam in a litigation in which he is not a party.[5] *Id.* at 40.

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[4] This Court in *Martin* recognized that even one who is not a party may be bound by a judgment where their interests have been adequately represented by someone with the same interests who is a party. *Id.* at 762 n.2.

[5] This Court in *Hansberry* noted that in the context of class actions, it is a familiar doctrine of the federal courts that

Based upon the foregoing, the County's constitutional right of due process was not violated and the petition fails to raise a constitutional question.

POINT II

THIS COURT SHOULD NOT EXERCISE JURISDICTION WHERE THE DECISION OF THE COURT OF APPEALS RESTS UPON ITS PROPER APPLICATION OF STATE LAW

The County asserts that the Court of Appeals violated principles in *Erie* by failing to apply the agency test articulated by the New Jersey Supreme Court in *Lehmann v. Toys 'R Us*, 132 *N.J.* 587, 626 *A.*2d 445 (1993) in analyzing the County's liability in the case at bar. The County also asserts that the imposition of liability on the County for the acts of the County's Prosecutor is without any legal authority. However, as discussed below, the County's erroneous assertions simply overlook the court's proper analysis and application of state law in an attempt to predict how the New Jersey Supreme Court would rule if presented with the issue.

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members of a class not represented as parties to the litigation may be bound by a judgment where they are, in fact, adequately represented by parties who are present, or where they actually participate in the conduct of the litigation in which members of the class are present as parties; or where the interest of the members of the class, some of whom are present, is joint, or where for any other reason the relationship between the parties present and those who are absent is such as legally to entitle the former to stand in judgment for the latter. *Id.* at 42. The Court found that it is assumed that such procedure affords protection to the parties who are represented, although absent, which would satisfy the requirement of due process. *Id.* at 42-43.

In *Lehmann*, the New Jersey Supreme Court articulated a test for evaluating liability of employers in cases of sexual harassment under New Jersey law. *Lehmann's* finding of employer liability was based on a theory of *respondeat superior* and agency principles and was premised upon the theory that a master exercises a degree of control over their servant and should be responsible for the servant's conduct. To date, no other reported decision has extended the test in *Lehmann* to a case involving liability of a county for the acts of a county prosecutor.

Contrary to petitioners' assertions, the Court of Appeals did not ignore the decision of the New Jersey Supreme Court in *Lehmann*. Rather, the court found that the New Jersey Supreme Court would not rely upon the agency test articulated in *Lehmann* to analyze the liability of the county prosecutor. Recognizing that the issue of whether a county prosecutor acts as a county official when making personnel decisions at a county level is a question of first impression, the court found that based upon a review of related authorities, county prosecutors have a dual or hybrid status. Applying those authorities, the court predicted that the New Jersey Supreme Court, if presented with a case in this position, would hold that county prosecutors are acting on behalf of the county when they make personnel decisions.

Recognizing the persistent and strong commitment to eradicating discrimination in the workplace expressed by the New Jersey Legislature and the New Jersey Supreme Court, the Court predicted that the New Jersey Supreme Court would hold that Kaye was the Monmouth County policymaker in regard to personnel actions in the Prosecutor's Office and that the County of Monmouth may be

held liable for the acts of intentional discrimination that occurred.

Based upon a thorough review of the statutes and constitutional provisions pertaining to the duties and powers of the county prosecutor, the court found that the district court erred in concluding that county prosecutors in New Jersey are agents of the State Attorney General when they make personnel decisions. The court also found support in the pronouncement of the New Jersey Supreme Court in *Morss v. Forbes*, 24 *N.J.* 341, 132 *A.*2d 1 (1957) that the prosecutor is primarily a local official and the court's discussion of the county prosecutor's authority.

The court also responded to the invitation in the decision in *Cashen v. Spann*, 66 *N.J.* 541, 334 *A.*2d 8, *cert. denied*, 423 *U.S.* 829 (1975) wherein the New Jersey Supreme Court found that a county prosecutor was acting as an agent of the state for his alleged tortious conduct arising after an investigation of criminal activity but expressly left open "for another day the question of whether a county may be held vicariously liable for the conduct of a prosecutor or his detectives in other circumstances." *Id.* at 14.

The Court of Appeals found that based upon their review of New Jersey law, they were convinced that when a county prosecutor engages in classical law enforcement functions, they act as officers of the state. However, where the county prosecutor decides when an employee at his office is worthy of a promotion, the county prosecutor is performing an administrative function on the local level entirely unrelated to the duties involved in criminal

prosecution and concluded that Prosecutor Kaye was acting as a local, county official when he denied Coleman's application for promotion. The court concluded that since Kaye was the final policymaking authority on behalf of the County of Monmouth in the Prosecutor's Office, the discriminatory acts of Kaye and his subordinates may be imputed to the county.

Although not of precedential value, the decision of the Court of Appeals is consistent with two (2) unreported decisions in New Jersey. *See Giuffre v. Bissell*, Civil Action No. 92-2014 (*D.N.J.* May 7, 1995) (holding that the county is liable under the theory of respondeat superior of the unlawful acts of the county prosecutor); (Resp. App. 4). *Knodel v. the Office of the Union County Prosecutor*, Civil Action No. 89-2490 (*D.N.J.* Jan. 5, 1990) (finding that the county was liable for the unlawful employment practices against an employee of the Union County Prosecutor's Office) (Resp. App. 20). This Court also previously denied certiorari in *Crane v. State of Texas*, 759 *F.*2d 412 (5th Cir. 1985), *amended in part on denial of rehearing*, 766 *F.*2d 193 (5th Cir.), *cert. denied*, 474 *U.S.* 1020 (1985) wherein the Fifth Circuit held that, for purposes of a civil rights action, a county could be liable for the acts of a district attorney.

The County's reliance upon the decision in *BMW v. Gore*, 116 *S.Ct.* 1589 (1996) for the proposition that imposition of liability for punitive damages on the County violates "well established constitutional principles" is misplaced. First, the facts and issues that were presented in *BMW v. Gore* relating to whether the amount of a punitive damages award violated due process is entirely distinguishable from the issues presented in the case at

bar relating to whether punitive damages can be imposed upon the County. The factors relating to the reprehensibility of the defendants' conduct does not, as petitioners contend, even remotely suggest that imposition of punitive damages violates the County's due process rights. The reprehensible nature of the County's conduct in the case at bar is not at issue since there was no objection to submitting the issue of punitive damages to the jury and there is no dispute that the jury was properly charged on the legal basis for an award of punitive damages under New Jersey law.[6]

POINT III

THIS COURT SHOULD NOT EXERCISE JURISDICTION AS TO THE ISSUES RELATING TO KAYE WHERE THERE IS NO CONFUSION OR CONFLICT AMONG THE COURTS AS TO LIABILITY UNDER 42 *U.S.C.* § 1983

Perhaps recognizing that the issues relating to the County's liability are not properly before this Court and in an effort to create a basis for jurisdiction, the petitioners assert that the decision of the Court of Appeals affirming the jury's finding of liability against John Kaye in his individual capacity is purportedly in conflict with some other decision of the Court of Appeals. However, contrary to petitioners' assertions, the decision of the Court of Appeals affirming the award of compensatory

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[6] The defendants have never appealed or raised in the district court or Court of Appeals, the amount of punitive damages as being excessive. Respondents' attempt to take issue with the amount of the award, for the first time on appeal is untimely, not properly before this Court and is legally incorrect.

damages against Kaye under 42 *U.S.C.* § 1983 is not in conflict with ***any*** decision.

As noted previously, following a seven day trial, a unanimous jury found that Monmouth County Prosecutor John Kaye had intentionally discriminated against Ms. Coleman by failing to promote her on three separate occasions because of her gender. That jury awarded Ms. Coleman the modest sum of $10,000 in compensatory damages against Kaye.

Petitioners challenge the decision of the Court of Appeals upholding the jury's award of $10,000 in damages to Coleman against Kaye and assert that the decision of the Court of Appeals is contrary to the decision of this Court or any other court of appeals.[7] However, an examination of the law reveals that contrary to respondents' assertions, there is no uncertainty or confusion among the courts regarding the issue of pretext. Rather, the Court of Appeals properly applied the prevailing legal principles and agreed with the district court's evaluation on this strictly fact specific determination that the jury's verdict was supported by sufficient evidence presented at trial to support Ms. Coleman's emotional distress damages.

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[7] The County's assertion that the only evidence of Kaye's involvement to support the jury's finding of liability against Kaye under 42 *U.S.C.* § 1983 was that he delegated such decisions to his subordinates; that Coleman wrote him two memoranda about her non-promotion; and that he did not personally respond to those memoranda is simply untrue. However, since petitioners have not taken issue with Kaye's liability as opposed to whether the award of damages is supported by the evidence, no further response is necessary.

Petitioners rely upon the decision in *Carey v. Piphus*, 435 *U.S.* 247 (1978) in support of their claim that plaintiff's pain and suffering and emotional distress do not constitute an actual injury for which she is entitled to compensatory damages. In *Carey*, the Court found that a group of students who had suffered a deprivation of their constitutional rights were not entitled to compensatory damages because they failed to show that they had suffered any compensable injury. There was no proof, testimony or other evidence presented that plaintiffs had suffered any injury as a result of the defendant's conduct. Significantly, plaintiff did not assert damages for pain and suffering and emotional distress.

By contrast, the jury's award of damages for pain and suffering in the case at bar is consistent with the law governing such issues under 42 *U.S.C.* § 1983. Although petitioners assert otherwise, the very cases cited by petitioners recognize the well established and consistent principle that emotional distress damages ***can*** be based on the complainant's testimony alone. There is nothing inconsistent with the finding that such damages may be based on the complainant's testimony with the recognized principles that evidence of emotional distress must be demonstrated. Courts have consistently interpreted 42 *U.S.C.* § 1983 to permit an award of damages even if based solely on complainant's testimony, provided that the damages are supported by credible evidence. *Bolden v. Southeastern Pennsylvania Transportation Authority*, 21 *F.*3d 29 (3d Cir. 1994), *reh. den.*, 1994 U.S.App. LEXIS 10558 (1994) (holding that expert testimony not required to prove emotional distress damages in civil rights action); *McKenna v. Pacific Rail Service*, 32 *F.*3d 820 (3d Cir. 1994); *Block v. R.H. Macy & Co., Inc.*, 712 *F.*2d 1241, 1245 (8th Cir.

1983); *Gore v. Turner*, 563 F.2d 159, 164 (5th Cir. 1977); *Smith v. Anchor Bldg. Corp.*, 536 F.2d 231, 236 (8th Cir. 1976); *Seaton v. Sky Realty Co., Inc.*, 491 F.2d 634, 636 (7th Cir. 1974).

The basis for the difference in decisions cited by respondents has always focused on a fact specific evaluation of the ***sufficiency*** of the evidence presented and naturally will result in different results depending upon the specific facts of the case and sufficiency of the evidence at trial.

For instance, in *Hetzel v. County of Prince William*, 89 F.3d 169 (4th Cir. 1996), the court set aside an award of damages for emotional distress of $500,000 for retaliation finding that the amount of the award was based on plaintiff's erroneous belief that she was the victim of discrimination which claim the jury had rejected. Although the court recognized that the evidence presented would not justify a substantial award of damages, the court did not find that an award of damages would be improper and remanded the matter to the district court for recalculation of the award of damages for emotional distress. *Id.* at 173.

In *Cohen v. Bd. of Education*, 728 F.2d 160 (2d Cir. 1984), the jury returned a special verdict and found that plaintiff suffered emotional distress but decided not to award him any damages. The Second Circuit found that, in view of the jury's knowledge of Cohen's reinstatement and other remedies, the failure to set aside a jury verdict was not in error. *Id.* at 102-103.

In *Nekolny v. Painter*, 653 F.2d 1164 (7th Cir. 1981), the court simply found that based upon the evidence presented, there was insufficient evidence of injury to support the award. In doing so, the court, analyzing the evidence presented, found that a single statement by a party that he was depressed or a little despondent was not enough to establish injury under the facts of that case. *Id.* at 1172-1173.

In *Spence v. Bd. of Education*, 806 F.2d 1198 (3d Cir. 1986), the Third Circuit found that "based on the facts of this case," the district court did not err in finding that the evidence was too speculative to support the award of $22,060 in emotional distress damages. The court found that plaintiff offered no evidence that she suffered physically and that the evidence consisted mainly of proof that she was depressed and humiliated by her transfer on one occasion. *Id.* at 1201.

In *Biggs v. Village of Dupo*, 892 F.2d 1298 (7th Cir. 1990), the court found that there was insufficient evidence to support the instruction on damages for mental distress. The court found that no direct testimony concerning mental distress was introduced other than plaintiff's testimony that he was concerned over the idea of "my family going through it." *Id.* at 1304.

In the case at bar, Ms. Coleman testified as to the continuous pain, suffering and humiliation that she suffered since her failure to be promoted in 1989. At trial, plaintiff explained that she was proud to be the first female investigator employed by the MCPO and started to get ahead by hard work and dedication. She explained that when she first learned of her failure to be promoted in May 1989, she was "stunned" and felt as if she had

been "kicked." She felt like a piece of "garbage." Plaintiff also testified about how she was physically affected as a result of the continual discrimination by the defendants. Plaintiff explained that she had difficulty sleeping and at times, became physically ill. It is apparent that the jury was persuaded to the extent that the discrimination affected her physical and emotional well being.

Plaintiff also testified that the discrimination also created a strain on her employment relationship. Plaintiff explained the stress involved in writing on two occasions to Prosecutor Kaye about her failure to be promoted and, upon returning to work after writing her complaints to Kaye, felt as if she was walking on "pins and needles." The plaintiff also explained how difficult it was for her to file a complaint with the EEOC after Kaye's failure to respond to her memo and described it as a "gut wrenching" experience. Plaintiff testified that she felt physically sick about having to file the charges against her boss and that her feelings intensified after the charges were filed with the EEOC. Understandably, the plaintiff feared having to go to work and face her boss after he had been served with charges.

After writing the memos, the plaintiff's employment relationship became even more difficult and stressful. Plaintiff had been the subject of numerous comments and remarks. In addition, plaintiff continued to work with the very co-workers who testified against her during the trial in this matter.

The plaintiff also explained how her failure to be promoted caused her uncertainty in planning. Plaintiff explained that she was living in a mobile home at the time that she filed the charges but was making plans to

buy a townhouse. However, due to her fear that she would have been fired after filing the charges with the EEOC, she was unable to purchase a house.

The plaintiff also explained that her decision to challenge her failure to be promoted in 1989 affected her ability to attend classes. Due to the Prosecutor's Office failure to assure plaintiff that they would not post any positions in her absence. In fact, a notice for a position was posted while plaintiff would have been away.

In light of the evidence at trial, the jury awarded $25,000 in compensatory damages of which amount $10,000 was awarded against Kaye. The amount of compensatory damages is certainly in line with other awards of compensatory damages for emotional distress that have been upheld by the courts. *See Keenan v. City of Philadelphia*, 983 F.2d 459 (3d Cir. 1993) (upholding the jury's verdict granting $640,000 in compensatory damages in favor of a police officer who alleged retaliation in violation of 42 *U.S.C.* § 1983)

CONCLUSION

The instant petition presents no issues that justify this Court's review and simply represents petitioners' dissatisfaction with the decision of the Court of Appeals. Furthermore, the decision of the Court of Appeals presents no constitutional issues relating generally to the liability of a county for the acts of a county prosecutor in New Jersey because it was based upon the court's independent and fact specific determination that the County waived any objection to jurisdiction and expressly agreed to submit the issue of its liability to the jury in the case at

bar. Moreover, the decision of the Court of Appeals was based upon its proper analysis and application of state law precedent to find that the County's liability is consistent with New Jersey state law.

As to petitioner Kaye, the decision of the Court of Appeals affirming the jury's award of damages against Kaye under 42 *U.S.C.* § 1983 was based upon its proper application of this Court's precedent. Contrary to petitioners' assertions, there is no confusion among the federal courts regarding the standards for permitting damages under 42 *U.S.C.* § 1983 and this Court's precedent has been uniformly understood and applied.

Based upon the foregoing, it is respectfully submitted that the petition fails to invoke this Court's jurisdiction and should be denied.

Respectfully submitted,

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Dated: December 4, 1996

APPENDIX

JOURNAL, MAY 15, 1995

Discrimination Award Upheld Against Prosecutor, Dismissed Against County – A federal judge dismissed a $365,000 jury award against Monmouth County for failing to promote a female investigator but upheld a $60,000 award against her boss, Monmouth County Prosecutor John Kaye.

The jury made the awards in a case tried before Judge Garrett Brown Jr. in Trenton last fall, but Monmouth County asked to intervene and have the award overturned.

In his ruling on May 4, Brown allowed the county to intervene and agreed with its position. Brown said the county wasn't properly named or served in the suit and that county prosecutors, who are appointed by the governor, answer to the state attorney general.

Last week, Linda Kenney, a Fair Haven attorney who represents the plaintiff, Barbara Coleman, 56, said that she would ask Brown for reconsideration of the decision.

She also plans a hedge in the event the appeal fails. She says that a second suit, which also alleges that Coleman wasn't promoted because she is a woman but deals with a separate incident, will be amended to include the state, Gov. Christine Todd Whitman, and Attorney General **Deborah Poritz.** The second suit, also before Brown, was filed last month, and at press time neither Kay nor the county, which this time was named, had answered.

Kaye's attorney, Gerald Dorf, of Rahway's **Dorf & Dorf,** says his client is weighing his options, but says that

there would be a cross-appeal if Coleman, who started at the office in 1978, files her appeal.

After a bifurcated trial on damages and liability before Brown, the jury ordered the county to pay Coleman $15,000 in compensatory and $350,000 in punitive damages. It also awarded $10,000 in compensatory and $50,000 in punitive damages against Kaye, whose reappointment was confirmed by the state Senate in the midst of the suit.

The awards had not been paid pending appeals. Dorf says he expects to file a brief on Kenney's fee application – for $300,000 in attorneys' fees – within the next two weeks.

Monmouth County Counsel **Malcolm Carton** says he is pleased with the verdict. As for a possible appeal by Coleman, he says, "I don't think she is going to get very far with it."

Carton, who practices at Avon's **Carton & Faccone**, also strongly disagrees with the part of the Brown decision that says state, not county officials, control the county prosecutors. The prosecutor "is not under the attorney general as many people think," he says, adding, "the prosecutor is very independent."

In fact, prosecutors are paid by the county in which they work, and Kaye's defense was paid by Monmouth County.

Jayne Rebovich, a spokeswoman for the attorney general, says that the office has not been notified about

an amendment to the second discrimination suit and has no comment.

– By Russ Bleemer

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

JAMES J. GIUFFRE,	:	Civil No. 92-2014 (AET)
Plaintiff,	:	
v.	:	OPINION
NICHOLAS BISSELL et al.,	:	
Defendants.	:	

THOMPSON, Chief Judge

This matter comes before the Court on defendant Somerset County's motion for summary judgment pursuant to Fed. R. Civ. P. 56(c). For the reasons act forth below, the Court will deny defendant's motion.

Background

This case has an extensive history of litigation, including an appeal to the Third Circuit. *See Giuffre v. Bissell,* 31 F.3d 1241 (3d Cir. 1994). A general review of plaintiff's factual allegations can be found in the Third Circuit's opinion and will not be restated here. *Id.* at 1248-1251.

The County seeks summary judgment arguing that it is not liable for the actions of the county prosecutor's office or its employees. The County contends that the prosecutor's office is a state agency over which it has minimal control. Since the County does not set policy for the prosecutor's office and because the prosecutor is

appointed by the Governor of New Jersey, defendant contends that plaintiff may not recover directly from the County as a named defendant. In support of its position, the County has submitted the "expert" report of James R. Zazzali, Esq. In his letter opinion he canvases [sic] the relevant case law and concludes that under the facts of the present case, the defendants are agents of the State of New Jersey, not Somerset County.

Plaintiff argues that the alleged actions taken by the prosecutor's office against plaintiff reflect a relationship with the County which is sufficient to create liability. Plaintiff contends that the individual defendants (primarily Prosecutor Bissell) hold positions with the County of such significance that their actions in this case may be imputed to the County. Plaintiff also contends that the County may be held liable because it benefits from the forfeiture statute used to allegedly coerce plaintiff into transferring to the County his ownership interest in certain places of real estate.

Discussion

I. Procedural Arguments

Plaintiff first opposes the County's motion on procedural grounds. Relying on the law of the case doctrine as well as this Court's 1993 scheduling Order, plaintiff contends that the Court has already ruled on the issue raised by the instant motion. Alternatively, plaintiff argues that the County waived its right to bring this motion. The law of the case doctrine at most advises against reconsideration of previously litigated issues. *Fagan v. City of Vineland*, 22 F.3d 1283, 1290 (3d Cir. 1994).

Plaintiff argues that this Court's July 29, 1993 Memorandum and Order rejected defendant's claim that the County is not liable for the acts of the individual defendants. While the issue may have been raised by the County in its July 1993 reply brief, the Court did not address nor decide it. Therefore, the Court concludes that the law of the case doctrine is inapplicable.

With respect to the timeliness of the County's summary judgment motion, the Court notes that Fed. R. Civ. P. 56 permits summary judgment motions to be filed any time during the litigation provided ten days within which to hold a hearing remain before trial. *In Re School Asbestos Litigation*, 977 F.2d 764, 793 (3d Cir. 1992). While the Court's 1993 scheduling Order required dispositive motions to be filed before June 11, 1993, this Court has the discretion to modify that Order and to consider subsequently filed motions. Moreover, the complexities which have delivered this case to its present posture warrant the Court's consideration of the County's liability. Therefore, the Court concludes that defendant Somerset County has not waived its right to bring the instant motion.

Plaintiff next argues that the County's responses to certain interrogatories bar the present motion. Specifically, plaintiff directs the court to interrogatories covering "policies and procedures by the Somerset County Prosecutor's Office and the County in effect from May 10, 1990 to the present." (Pl.'s Cross-statement of Material Facts Ex. A.) Apparently defendant Bissell, as a county representative, responded to these interrogatories. Plaintiff contends that allowing Bissell to answer the interrogatories on behalf of the County is tantamount to

admitting that Bissell is a county policy-maker. Plaintiff also directs the Court to the County's statement that the individual defendants acted within the scope of their employment "by the County" in committing the unconstitutional conduct alleged in plaintiff's complaint. Estopping the County from arguing that the individual defendants are not "County policy-makers" would ascribe far too much significance to the factors plaintiff relies upon. Plaintiff's argument is especially weak given that all the defendants were represented by the same attorney until recently. The Court will therefore reach the merits of defendant's motion.

II. Summary Judgment Standard of Review

A court may enter summary judgment if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party has satisfied this initial burden, the opposing party must establish that a genuine issue exists. *Jersey Central Power & Light Co. v. Lacey Township*, 772 F.2d 1103, 1109 (3d Cir. 1985), *cert. denied*, 475 U.S. 1013 (1986). Not every issue of fact will be sufficient to defeat a motion for summary judgment; issues of fact are genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). It is not enough to simply show that some "metaphysical" doubt exists as to the material facts. *Metsushita Electric Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Further, the opposing party cannot rest upon mere allegations; it must present actual evidence that creates a genuine issue

of material fact. *Liberty Lobby*, 477 at 249 (citing *First Nat'l Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 290 (1968)). The court must draw all reasonable inferences in the opposing party's favor, and must accept that party's evidence when considering the merits of the summary judgment motion. *See Country Floors, Inc. v. A Partnership Composed of Genner and Ford*, 930 F.2d 1056, 1061 (3d Cir. 1991).

In deciding a motion for summary judgment, it is not the court's role to make findings of fact, but to analyze the facts presented and determine if a reasonable jury could return a verdict for the nonmoving party. *See Big Apple BMW, Inc. v. BMW of North America, Inc.*, 974 F.2d 1358, 1363 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 1262 (1993). It is in this light the Court must undertake an analysis of the facts of this case.

III. The County's Liability

In *Monell v. New York City Dep't of Social Services*, 436 U.S. 658 (1978), the United States Supreme Court addressed the liability of a local government entity under 42 U.S.C. § 1983. The Court concluded that § 1983 does not permit a municipality to be held vicariously liable for the actions of its employees under the theory of *respondeat superior. Id.* at 694. However, a municipality may be liable under § 1983 where "action pursuant to official municipal policy of some nature caused a constitutional tort." *Id.* at 691. Since *Monell*, the Supreme Court has refined the doctrine of municipal liability. In *Pembaur v. City of Cincinnati*, 475 U.S. 469, 478 (1986), the Court explained that "*Monell*, was a case about responsibility," Justice Brennan,

in his Opinion for the Court, noted that § 1983 imposes liability "only on a person who 'subjects, or causes to be subjected,' any individual to a deprivation of federal rights . . . " *Id.* (quoting *Monell*, 436 U.S. at 692). Hence, the plaintiff in a § 1983 action must show that the acts which caused his harm are "acts which the municipality has officially sanctioned or ordered." *Id.* at 480. The plaintiff will have satisfied his burden if he can show that his injury can be traced to "municipal officials who have 'final policymaking authority' " in that area of the government's business. *City of St. Louis v. Propromik*, 485 U.S. 112, 123 (1988) (O'Connor, J.) (citing *Pembaur*, 475 U.S. at 483). Whether an individual is a policy-maker for the municipality is a matter of state or local law to be decided by the court before the case is submitted to the jury. *Id.* at 124 (citing *Pembaur*, 475 U.S. at 483); *Jett v. Dallas Independent School District*, 491 U.S. 701, 737 (1988).

New Jersey courts have not addressed whether a county may be held liable for the acts of the county prosecutor under 42 U.S.C. § 1983. However, the New Jersey Supreme Court has generally addressed the relationship among the county prosecutor, the county and the state on more than one occasion. In *Morss v. Forbes*, 24 N.J. 341, 374 (1957), the Court held that the New Jersey State Constitution's separation of powers doctrine would not be violated if a county prosecutor had to disclose certain documents to a committee of the New Jersey State Legislature. The Court found that county prosecutors were not sufficiently controlled by the executive branch of the state government to warrant executive privilege on separation of powers grounds. *Morss*, 24 N.J. at 372-73. The Court noted that the:

> prosecutor is primarily a local official. There is no equality in statute or dignity with the legislature. He cannot claim freedom from properly conducted legislative investigation on the ground that such will subvert the division or powers envisioned by our forefathers as an effective check on despotism.

Id. at 373.

In *Cooper v. Imbriani*, 63 N.J. 535 (1973) (*per curiam*) the defendant county denied tenure to detectives working for the county prosecutor on the ground that the detectives were not county employees, but rather employees of the county prosecutor's office. Interpreting N.J. Stat. Ann. §§ 2A:157-1. *et seq.*, the New Jersey Supreme Court ruled that for purposes of that statute, the detectives were in fact county employees and therefore entitled to tenure protection.

Of the cases decided by the New Jersey courts, *Cashen v. Spann*, 66 N.J. 541, 552, *cert. denied*, 423 U.S. 829 (1975) is most analogous to the case *sub judica*. The issue in *Cashen* was whether a county was vicariously liable for the acts of the county prosecutor's office and its employees relating to the investigation of criminal activity. The plaintiff in *Cashen* sought to hold the county vicariously liable for damages arising out of an allegedly illegal search of his home. The Court concluded that, under the facts of the case, the county was not liable because the prosecutor and his detectives should be considered agents of the state, not the county. The Court stated, "[w]e find it appropriate to regard the defendant officials as State agents where the alleged tortious conduct arose out of the investigation of criminal activity, but

we express no opinion on the question of whether the prosecutor or his detectives can be considered State or county employees for other purposes." *Id.*

Shortly thereafter, the New Jersey Supreme Court decided *Dunne v. Fireman's Fund American Insurance Company,* 69 N.J. 244, 250 (1976). Both *Dunne* and *Cashen* involved the same illegal search incident. The issue in *Dunne,* however, was whether the county's insurer was required to pay to defend the suit under the terms of its policy with the county. Although the Court had previously held that the county was not vicariously liable for the alleged acts of the defendants in the case, the Court concluded that the insurance policy required the insurer to defend the suit. In reaching its conclusion, the Court stated:

> the county-county detective relationship is that of employer-employee for certain administrative and remunerative purposes. This finding is not inconsistent with our conclusion that in preparing and executing the affidavit upon which the search warrant was based and conducting the search, Dunne, Bickley and Spann were "agents of the State." At the same time they were also employees of and there existed an employer-employee relationship with the County.

Dunne, 69 N.J. at 250-51.

Subsequently, the Superior Court, Appellate Division held that assistant prosecutors and detectives are employees whose "authority and duty" relate to a county only. *Passaic County Prosecutor v. Passaic County Freeholders,* 159 N.J. Super. 258, 267 (App. Div. 1978). The defendant county in *Passaic* had imposed a residency

requirement on assistant prosecutors and detectives duly appointed by the plaintiff county prosecutor. However, the Appellate Division's decision upholding the residency requirement rested primarily on the language of particular statutes which are not relevant to the present case.

The New Jersey courts appear to have drawn a distinction between substantive or discretionary duties involving law enforcement, where the actors are viewed as state agents, and personnel issues, where the actors are viewed as county agents. Superficially, the prosecutor's status as a state or county agent would appear to determine the issue of county liability. Since the parties in the present case do not dispute that the prosecutor is the final policy-maker for his office, a finding that he is a county agent would, in theory, render the county liable, However, municipal liability under § 1983 is not premised on an agency relationship in the same way as liability under the doctrine of *respondeat superior.* Rather § 1983 assigns liability only to a person who "subjects, or causes to be to be [sic] subjected," any individual to a deprivation of human rights. *Pembaur,* 475 U.S. at 478. In other words, "recovery from a municipality is limited to acts that are, properly speaking, acts 'of the municipality' – that is, acts which the municipality has officially sanctioned or ordered." *Id.* at 480. Therefore, the prosecutor's status as a state or county agent, although relevant to determining county liability, must be considered along with the overall dynamic between the county prosecutor's office and the county as well as the county's role in causing the harm plaintiff allegedly suffered.

In New Jersey, criminal law enforcement is primarily the responsibility of the county prosecutor. N.J. Stat. Ann. § 158-1. Each prosecutor's jurisdiction is limited to the borders of the county itself. *Id.* The county funds the prosecutors' office entirely. N.J. Stat. Ann. §§ 2A:158-1 *et seq.* The county obviously benefits tremendously from the operation of the prosecutor's office because of its role in minimizing crime and ensuring that criminals are quickly and appropriately punished. However, the county appears to have little control over the prosecutor because he is a Governor's appointee who is ultimately responsible only to state officials. Whether an individual will be investigated by the prosecutor's office, how the investigation is conducted, the questioning of the suspect, the decision to dismiss charges and the decision to invoke the forfeiture statute[1] are decisions outside the county's authority. Plaintiff has not directed the Court to judicial or statutory authority which indicates that Somerset County could have prevented defendants from committing the allegedly unconstitutional acts. The County had no authority to terminate the prosecutor, to approve or disapprove of his actions, or to legislate the laws he is to

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[1] N.J. Stat. Ann. § 2C:64-3(a) states:

> Whenever any property other than prima facie contraband is subject to forfeiture under this chapter, such forfeiture may be enforced by a civil action, instituted within 90 days of the seizure and commenced by the State and against the property sought to be forfeited.

The property in the present case, real estate owned by Giuffre, is not prima facie contraband and its forfeiture is therefore governed by this statute. The Court notes that the action is commenced in the name of the state and not the county.

enforce.[2] This Court realizes the apparent inequity of requiring a county, in essence its tax-payers, to be liable for the actions of an office whose director is selected by the Governor and over which it exercises no control. However, the nature of the county prosecutor's office, the reason for its existence and the individuals whom it is designed to serve reveal its inherently local nature. Thus the Court concludes that under some circumstances a county may be liable for the decisions of its prosecutor. The facts alleged in the present case exemplify the hybrid role of the county prosecutor and the type of conduct which would warrant holding the County liable for his actions.

Plaintiff alleges that prosecutor Bissell initially offered him the opportunity to repurchase his forfeited property from the County for $100,000. The prosecutor is alleged to have then rejected plaintiff's subsequent offer in that amount. Plaintiff contends that the property was eventually sold to "insiders" for a significantly smaller sum. Although these allegations constitute only a portion of plaintiff's complaint, they are significant because the

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[2] The Court notes that forfeiture provisions require county approval for the prosecuting agency to use seized property pending the disposition of the forfeiture action. N.J. Stat. Ann. § 2C:64-3(h). This requirement is sensible since under the statute title in illegally used or obtained property vests in the entity funding the prosecuting agency at the time the property was illegally used or obtained. N.J. Stat. Ann. § 2C:64-7. However, it does not extend to the county any authority to enforce the forfeiture provisions or to direct the prosecutor's office in its enforcement of the forfeiture provisions.

forfeiture statute does not anticipate the county prosecutor's participation in the sale of the property after it has been forfeited. The statute merely states that title in the property will vest with the county. N.J. Stat. Ann. § 2C:64-7. Hence, plaintiff's allegations suggest that the prosecutor carried out duties for the County which extended beyond his investigatory and prosecutorial roles.

Plaintiff further argues that because the County generally benefits from the forfeiture statute, it should be liable for the tortious conduct of those individuals acting pursuant to the statute's authority. This theory of liability appears inconsistent with the underlying goals of § 1983 as expressed by the United States Supreme Court and in the New Jersey Supreme Court's cases dealing with the county-county prosecutor relationship. The benefit to the County is purely financial and has no effect on the operation of the prosecutor's office. Moreover, the County has no clear authority to direct forfeiture, it is merely a recipient of funds or property. This structural description, although usually accurate, ignores the very essence of plaintiff's complaint in the case *sub judice*.

The allegations here reflect an agreement involving property not all of which would have been subject to forfeiture (according to plaintiff) and which was not consummated in a court of law. The prosecutor's alleged role in the acquisition and disposition of plaintiff's property may not be so easily dismissed as beyond the County's authority. The Court is cognizant of how "intimately connected with the criminal process" a civil forfeiture action is. *Schrob v. Catterson*, 948 F.2d 1402, 1411 (3d Cir. 1991) (referring to the federal forfeiture statute). The present

case, though, does not present the typical *in rem* proceeding for the forfeiture of property.

Plaintiff cites to a *Davis v. Ector County, Texas*, 40 F.3d 777 (5th Cir. 1994) and *Dotson v. Chester*, 937 F.2d 920 (4th Cir. 1991). In both cases, the courts held that high level county employees who, under state law, were considered state officials, were nevertheless county policy-makers. In *Davis*, the Ector County District Attorney, who exercised "free reign" over the District Attorney's office and set policy "without oversight," was held to be a policy-maker for the County. The Fifth Circuit noted that although the office of District Attorney is state created, it is "limited to exercising powers in Ector County, it is elected by Ector County voters, and it is supported with Ector County funds." The *Davis* Court relied heavily on *Crane v. State of Texas*, 766 F.2d 193 (5th Cir.), *cert. denied*, 474 U.S. 1020 (1985). In *Crane*, the Fifth Circuit addressed whether, for purposes of a civil rights action, a Texas District Attorney is a state or county agent. The Court held:

> Other and more significant factors, generally speaking, argue he is a local official. He is elected by the voters of his district, usually one county. His major powers and duties – which concern the prosecution of serious crimes and which he exercises alone without responsibility to the state Attorney General, who has no general prosecutorial powers, – are limited to the territory of the district. He is paid by county funds, although these are partly reimbursed by the state.

* * *

> For present purposes, then, we conclude that he is properly viewed as a county official, elected by its voters and responsible for its relevant policy.

Crane, 766 F.2d at 195.[3]

In *Dotson*, the Fourth Circuit similarly concluded that an elected county sheriff was the final policy-maker for the county with respect to the operation of the county jail. 937 F.2d at 932. The Fourth Circuit focused on a myriad of factors including the sheriff's status as an elected official and the sheriff's role as manager of the county facility. *Id.*

Naturally, the New Jersey law which calls for the appointment of county prosecutors by the Governor distinguishes the present case from *Davis*, *Crane* and *Dotson*. Nevertheless, the elected status of the officials was only one factor which these courts considered. In New Jersey, the Supreme Court has clearly held that liability of the county is a fact specific inquiry. *Cashen*, 66 N.J. at 552. The

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[3] The *Crane* Court also stated, "But even were he a State official in every sense, called so in State law and designated by the State to make policy for its other creature, the county, our answer would likely remain the same; county responsibility for violation of the Constitution cannot be evaded by such ingenious arrangements." 766 F.2d at 195. This language suggests that a county would under almost all circumstances be liable for the actions of the county prosecutor. However, the Fifth Circuit's decision in *Crane* was entered in 1985, before the Supreme Court's holdings in *Pembaur*, 475 U.S. 469, and *Praprotnik*, 485 U.S. 112, were handed down. These two holdings leave the question of whether an individual has final policy-making authority in the hands of the states, limiting the Fifth Circuit's language in *Crane*.

allegations of abuse by defendant Bissell in conjunction with other county officials, for a purpose which benefits the County financially, highlight the intimate relationship between Somerset County and defendant Bissell's office. Unlike the prosecutor in *Cashen* whose abuses arose from actions which fell squarely within the traditional role of a prosecutor, defendant Bissell is alleged to have engaged in more expansive misconduct extending well beyond the reach of his office. Justice O'Connor warned lower courts to be wary of "egregious attempts by local governments to insulate themselves from liability for unconstitutional policies." *Id.* at 127. The Court is satisfied that acts allegedly committed by defendant Bissell, if proven, could constitute official county policy. Therefore the Court will deny the County's motion for summary judgment on the federal claims at this time.

Since the Court will deny defendant's motion on plaintiff's federal claims, the Court will retain jurisdiction over plaintiff's state claims.

Conclusion

In light of the foregoing, the Court will deny defendant Somerset County's motion for summary judgment. An appropriate order is filed herewith.

May 7th, 1995

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

JAMES J. GIUFFRE, Plaintiff, v. NICHOLAS BISSELL, et al., Defendants.	:	Civil No. 92-2014 (AHT) **ORDER**

For the reasons set forth in the Opinion filed herewith, it is on this 7th day of May 1995

ORDERED that defendant Somerset County's motion for summary judgment be and hereby is denied.

/s/ Anne E. Thompson
ANNE E. THOMPSON,
CHIEF JUDGE

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

JOSEPH M. KNODEL, Plaintiff, v. STATE OF NEW JERSEY; COUNTY OF UNION; OFFICE OF THE UNION COUNTY PROSECUTOR/STATE OF NEW JERSEY, OFFICE OF THE COUNTY PROSECUTOR/ UNION COUNTY PROSECUTOR'S OFFICE; UNION COUNTY PROSECUTOR JOHN H. STAMLER; FIRST ASSISTANT UNION COUNTY PROSECUTOR EDMUND J. TUCKER; UNION COUNTY PROSECUTOR'S OFFICE TRIAL SUPERVISOR RICHARD P. RODBART; and UNION COUNTY PROSECUTOR'S OFFICE OF JUVENILE SECTION SUPERVISOR ROBERT P. O'LEARY, Defendants.	Civil Action No. 89-2470 **OPINION**

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BISSELL, *District Judge*

This civil action was filed on June 9, 1989 by Joseph M. Knodel alleging various unlawful employment practices by his employer, the Union County Prosecutor's Office ("Prosecutor's Office"). Additional defendants named in this action include the State of New Jersey, County of Union, Union County Prosecutor John H. Stamler, First Assistant Union County Prosecutor Edmund J. Tucker, Trial Supervisor Richard P. Rodbart and Juvenile Section Supervisor Robert P. O'Leary.

On February 7, 1987, the plaintiff was hired by the Union County Prosecutor's Office as a "Legal Intern." (Compl. ¶ 9). At the time, Mr. Knodel was in his second year of law school. (*Id.*) On January 1, 1988, Mr. Knodel was "promoted" to the position of "Criminal Justice Specialist" and received a commensurate pay raise. (*Id.*, ¶ 10). On Augut [sic] 3, 1988, the plaintiff received an 8% merit pay increase, bringing his annual salary up to $16,014.00. (*Id.*, ¶ 12). It is alleged, however, that on August 29, 1988, two women were hired as Criminal Justice Specialists at higher salaries than the plaintiff. (*Id.*,

¶ 13). The two women were paid $18,000.00 and $20,500.00 a year respectively. (*Id.*, ¶ 14). On October 18, 1988, the defendants offered Mr. Knodel an increase in his salary to $18,000.00 a year, retroactive to September 20, 1988. (*Id.*, ¶ 15). The plaintiff alleges that he challenged the pay differential and was threatened, abused and harassed by the defendants. (*Id.*, ¶¶ 15-17). Ultimately, he was discharged. (*Id.*, ¶ 17).

The complaint charges defendants with wage discrimination in violation of the Equal Pay Act (Count I); retaliation for asserting a violation of the Equal Pay Act (Count II); wage discrimination in violation of the New Jersey law (Count III); retaliation for asserting wage discrimination in violation of New Jersey law (Count IV); violations of the first and fourteenth amendments to the United States Constitution (Count V); violations of the New Jersey Constitution (Count VI); violations of the fifth and fourteenth amendments (Count VII); and intentional infliction of emotional distress (Count VIII).

Plaintiff has invoked the original jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 42 U.S.C. § 1983.

Presently before the Court is defendant County of Union's motion to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6).

DISCUSSION

Rule 12(b)(6) Analysis

Fed. R. Civ. P. 12(b)(6) states that:

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion. . . . (6) failure to state a claim upon which relief can be granted.

Union County contends that Mr. Knodel, as an employee of the Union County Prosecutor's Office and not the County of Union, cannot properly maintain an action against it. (Br. in Support at 4). Union County argues that the prosecutor's office is an independent *state* agency that is not controlled by the county government. Therefore, the plaintiff is not a *county* employee. (*Id.*, at 13). Defendant points to the legislative history of the formation and structure of county prosecutors' offices and their relative independence from the Board of Chosen Freeholders as evidence of their total freedom from the county in employee matters. (*Id.*, at 5-6) (citing N.J.S.A. 40:20-1.3a-1.3c and 40:20-1.4). Defendant also cites several New Jersey court decisions that held, in the context of lawsuits against the prosecutor's office, that the prosecutor and his detectives were agents of the state and not the county. (*Id.*, at 6-8).

The standard for withstanding a motion to dismiss under Rule 12(b)(6) is not a difficult one to meet. "While a complaint should not be dismissed unless the court determines that the allegations do not support relief on

any legal theory, the complaint nonetheless must set forth sufficient information to suggest that there is some recognized legal theory upon which relief may be granted." *District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077, 1078 (D.C. Cir. 1984). Similarly, "[i]t is axiomatic that, to withstand a motion to dismiss, a plaintiff is not required to provide evidence of or prove the truthfulness of his complaint." *Quinones v. Szorc*, 771 F.2d 289, 291 n.3 (7th Cir. 1985). *A fortiori*, a

> [c]omplaint should not be dismissed merely because plaintiff's allegations do not support the particular legal theory he advances, since the court is under a duty to examine the complaint to determine if the allegations provide for relief on any possible theory, nor should the complaint be dismissed that does not state with precision all the elements that give rise to a legal basis for recovery; nor should a complaint be dismissed merely because the court doubts plaintiff will prevail in the action since that determination is properly made on the basis of proof and not merely on pleadings. The question therefore is whether in the light most favorable to plaintiff the complaint states any valid claim for relief. As a practical matter, a dismissal under Rule 12(b)(6) is likely to be granted only in an unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.

Thomas W. Garland, Inc. v. St. Louis, 596 F.2d 784, 787 (9th Cir.), *cert. denied*, 444 U.S. 899 (1979) (quoting *Jackson Sawmill Co. v. United States*, 580 F.2d 302, 306 (8th Cir. 1978)).

In the present case, the plaintiff Knodel has clearly advanced allegations which could lead to the relief he seeks. The fact that county prosecutors' offices have more autonomy from county government structure than other county offices does not mean that the county is free from liability.

The County of Union, through its Board of Chosen Freeholders, annually appropriates the funds to be used by the Union County Prosecutor's Office. *See* N.J.S.A. 40:20-1. Additionally, the county prosecutor, as an executive appointment (N.J. Const., art. 7, § 2, ¶ 1), is vested with the authority to seek additional funding by order of the assignment judge for the county. N.J.S.A. 2A:158-7 provides:

> All necessary expenses incurred by the prosecutor . . . shall, upon being certified to by the prosecutor and approved, under his hand, by a judge of the superior court . . . be paid by the county treasurer *whenever the same shall be approved by the board of chosen freeholders of such county.* The amount or amounts to be expended shall not exceed the *amount fixed by the board of chosen freeholders* in its regular or emergency appropriation, unless such expenditure is specifically authorized by order of the assignment judge of the superior court for such county.

(Emphasis added). This statute illustrates the county's direct role in the finances of the prosecutor's office. Even though the prosecutor may apply to the assignment judge for additional money, the board of chosen freeholders is the primary authority. For example, the salaries for certain employees require the board's approval. N.J.S.A.

2A:158-16 provides that assistant prosecutors' annual salaries will "be fixed by resolution of the board of chosen freeholders on recommendations of the county prosecutor. . . . "

Several New Jersey court decisions have examined the relationship between prosecutors' offices and the county. In *Ruvoldt, Jr. v. Clark, Jr.*, 204 N.J. Super. 438 (App. Div. 1985), the Appellate Division held that the prosecutor was not required to obtain the freeholders' permission for *non-salary* expenditures which do not exceed the budget. The court noted, however, that this did not mean the county was "bereft of authority" with respect to funding. (*Id.* at 441). The court stated:

> The County Freeholders must make the initial determination as to the amount of the appropriations for the Prosecutor's Office. If the Prosecutor differs, he must establish before the Assignment Judge the reasonable necessity of expenditures in excess of the amount authorized by the Freeholders. Furthermore, the Board of Freeholders has statutory authority to fix salaries in the Prosecutor's Office, even if those salaries are within the Prosecutor's appropriations.

(*Id.*, citing *In re Ruvoldt Application*, 187 N.J. Super. 81, 91 (App. Div. 1982) and N.J.S.A. 2A:158-16). The court explained the role of the county government as one limited by statute. The court held:

> Without in any way denigrating county government's significant place in our governmental scheme, it would be incongruous to permit county government to control the operations and functions of the Prosecutor, a constitutional

> officer entrusted with awesome duties of "vast importance to the public". County government has a rightful role to play in the formulation and approval of the Prosecutor's budget and the fixing of salaries within the Prosecutor's office; all as set forth by statute, and all, of course, subject to the authority of the Assignment Judge under the *Bigley* statute.
>
> However, the imperative of independent and effective law enforcement requires that county authority be limited to those specifically authorized areas. Expanding county authority vis-a-vis the Prosecutor is not warranted by statutory construction or good public policy.
>
> To summarize, the non-salary expenditure sought here by the Prosecutor is within his authorized budget and therefore not subject to County control or to Assignment Judge supervision.

(*Id.* at 442-43).

Similarly, in *Tate v. Amato*, 220 N.J.Super. 235 (App. Div. 1987), the Appellate Division held that the county executive properly exercised his authority, to avoid exceeding spending limits, when he refused to process personnel forms necessary for the prosecutor to hire additional employees. The court stated that the proper procedure for a prosecutor to obtain funds in excess of the county appropriation is to apply to the assignment judge. (*Id.* at 241). This is commonly referred to as a *Bigley* application. *See In re Application of Bigley*, 55 N.J. 53 (1969) (prosecutor has right to seek additional funds under N.J.S.A. 2A:158-7).

Perhaps the most relied upon and emphasized case by both parties to this motion is *Cashen v. Spann*, 66 N.J. 541, *cert. denied*, 423 U.S. 829 (1975). In *Cashen*, plaintiffs brought a civil action against the County of Morris, the county prosecutor, various county detectives, the telephone company and the unidentified informant for damages arising from an allegedly illegal search of their home (*Id.* at 544). In the context of this suit, the New Jersey Supreme Court held that county detectives were agents of the state and not the county. (*Id.* at 552). However, the Court limited its holding to the facts of the particular case before it. (*Id.*) The Court stated:

> We also agree with the Appellate Division that in the context of this case, the prosecutor and the detectives are to be considered as agents of the State and not the county. *Cashen, supra*, 125 N.J. Super. at 404-05. We wish to make it clear, however, that our resolution of this issue is limited to the factual circumstances here presented. *We find it appropriate to regard the defendant officials as State agents where the alleged tortious conduct arose out of the investigation of criminal activity, but we express no opinion on the question of whether the prosecutor or his detectives can be considered State or county employees for other purposes. See Cooper v. Imbriani*, 63 N.J. 535 (1973). We also leave for another day the question of whether a county may be held vicariously liable for the conduct of a prosecutor or his detectives in other circumstances.

(*Id.*) (emphasis added).

In a subsequent related action, the New Jersey Supreme Court emphasized the "hybrid status" of county prosecutors' detectives. *Dunne v. Fireman's Fund Am. Ins.*

Co., 69 N.J. 245, 248 (1976). In deciding that the Morris County Prosecutor's Office detectives were "persons insured" under the county's liability policy, the Court noted

> County prosecutors' detectives possess a hybrid status. The position has been created by the County Detectives and County Investigators, Act. N.J.S.A. 2A:157-1 *et seq.* – the title, perhaps indicative of some legislative intent, reflects their identification with the county. The Act authorizes the prosecutor to appoint persons "to be known as county detectives, to assist the prosecutor in the detection, apprehension, arrest and conviction of offenders against the law." N.J.S.A. 2A:157-2. The prosecutor, a State officer, selects and supervises them. The financial burdens related to the position are imposed on the county. The salary is paid by the county. N.J.S.A. 2A:157-18. The prosecutor may, with the approval of the board of chosen freeholders, fix the salary in excess of the statutory minimum. N.J.S.A. 2A:157-18. No county detectives may be appointed in counties where the number of detectives exceed the maxima fixed by statute (50 in the first class counties, N.J.S.A. 2A:157-3, 28 in certain second class counties, N.J.S.A. 2A:157-4, etc.), without the prior approval of the board of chosen freeholders, except in a county of the first class with a population under 800,000. N.J.S.A. 2A:157-22. Further, all necessary expenses incurred by county detectives, such as costs of insurance, automobiles, and other necessities, must be paid by the county. N.J.S.A. 2A:157-19 and 2A:158-7. The amounts may not exceed those fixed by the freeholders unless specifically authorized by the Superior

> Court assignment judge for that county. *In re Application of Bigley,* 55 N.J. 53 (1969); *In re Application of Schragger,* 58 N.J. 274 (1971). In those cases we pointed out that even where the assignment judge determines the number of additional detectives to be hired at certain salaries it was appropriate for the prosecutor initially to present his needs to the freeholders before turning to the assignment judge for relief.
>
> * * *
>
> Recognition of county control over county detectives and of existence of an employer-employee relationship is not novel. In *Cooper v. Imbriani,* [63 N.J. 535 (1973)], we expressly rejected the contention that they were not county employees, at least for the purpose of determining whether they were in the classified service [civil service status].-(*Id.* at 537 n.1).

Dunne, 69 N.J. at 248-49. The Court reasoned that,

> From all the foregoing it may be seen that the county-county detective relationship is that of employer-employee for certain administrative and remunerative purposes. This finding is not inconsistent with our conclusion that in preparing and executing the affidavit upon which the search warrant was based and conducting the search, Dunne, Bickley and Spann were "agents of the State." At the same time they were also employees of and there existed an employer-employee relationship with the County.

(*Id.* at 250-51).

Cashen and *Dunne* dealt with the issue of county detectives in the performance of their official duties. The

New Jersey Supreme Court recognized their dual capacity as both state *agents* and county *employees* depending upon the situation. In the matter *sub judice*, the plaintiff was a legal assistant, a support staff position, funded directly by the county. *See* N.J.S.A. 2A:158-18.1 and *Cetrulo v. Byrne*, 55 N.J. Super. 199 (1959), *aff'd*, 31 N.J. 320 (1960). In *Cetrulo*, the New Jersey Supreme Court emphasized that it is the county prosecutor's right, not the board of freeholders, to directly appoint legal assistants. 31 N.J. at 328-29. While it is the prosecutor's duty to appoint or select the individuals to fill such positions, the county freeholders "provide for" their appointment and pay their salaries. (*Id.* at 329). The Court stated that "where legal assistants are appointed by the county prosecutor . . . he will obtain approval of the board [of chosen freeholders] for payment of their salaries. . . . " (*Id.* at 329-30).

The previous cases demonstrate the relationship between the prosecutor and the county. The county has the initial responsibility for appropriating the annual budget for the prosecutor's office. Realizing the important role vested with the prosecutor, the legislature provided an additional procedure to obtain funds in excess of the budget by obtaining an order from the assignment judge. This procedure clearly demonstrates the necessity of including the County of Union as a defendant in this action.

Further support for this is obtained in Fed. R. Civ. P. 19. Rule 19(a)(1) provides:

> A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action

> shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, ...

In *Troy Towers Tenants Ass'n v. Botti*, 94 F.R.D. 37, 38 (1981), the United States District Court for the District of New Jesey [sic] explained that Rule 19(a)(1) required cities and local governments "to be joined as parties when they will be affected by the lawsuit or when adequate relief cannot be awarded in their absence." *See also Albro v. County of Onondaga, N.Y.*, 627 F. Supp. 1280, 1289 (N.D.N.Y. 1986). Since the county is the primary source of funding for the prosecutor's office, any judgment against that office would necessarily involve the county in satisfying the award. Defendant Union County has not met its burden of showing that there is *no* "recognized legal theory upon which relief may be granted" against it. At the very least, it appears that should plaintiff prevail, Union County will have to appropriate and/or allocate funds to satisfy any money judgment.

CONCLUSION

For the foregoing reasons, the County of Union's motion to dismiss the complaint is denied.

/s/ John W. Bissell
JOHN W. BISSELL
United States District Judge

DATED: January 5, 1990

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

JOSEPH M. KNODEL, Plaintiff, v. STATE OF NEW JERSEY; COUNTY OF UNION; OFFICE OF THE UNION COUNTY PROSECUTOR/STATE OF NEW JERSEY, OFFICE OF THE COUNTY PROSECUTOR/ UNION COUNTY PROSECUTOR'S OFFICE; UNION COUNTY PROSECUTOR JOHN H. STAMLER; FIRST ASSISTANT UNION COUNTY PROSECUTOR EDMUND J. TUCKER; UNION COUNTY PROSECUTOR'S OFFICE TRIAL SUPERVISOR RICHARD P. RODBART; and UNION COUNTY PROSECUTOR'S OFFICE JUVENILE SECTION SUPERVISOR ROBERT P. O'LEARY, Defendants.	Civil Action No. 89-2470 **ORDER**

For the reasons set forth in the Court's opinion filed herewith,

It is on this 5th day of January, 1990,

ORDERED that defendant County of Union's motion to dismiss the complaint be and it hereby is denied.

/s/ John W. Bissell
JOHN W. BISSELL
United States District Judge

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1996

JOHN KAYE, Individually and in his capacity as Monmouth County Prosecutor; THE COUNTY PROSECUTOR'S OFFICE OF THE COUNTY OF MONMOUTH; JOHN DOES 1-100; JANE DOES 1-100

THE COUNTY OF MONMOUTH,
Intervenor in District Court,
Petitioners,
v.

BARBARA COLEMAN,
Respondent.

On Petition For A Writ of Certiorari
To The United States Court Of Appeals
For The Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF NEW JERSEY ASSOCIATION OF COUNTIES IN SUPPORT OF PETITIONER'S PETITION FOR A WRIT OF CERTIORARI

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POINT I

THE MOTION BY THE ASSOCIATION OF COUNTIES FOR LEAVE TO FILE AMICUS CURIAE SHOULD BE DENIED

This brief is submitted on behalf of respondent Barbara Coleman pursuant to Supreme Court Rule 37(5) in opposition to the motion of the New Jersey Association of Counties ("Association") for leave to file an *amicus curiae* brief in the instant matter. As discussed below, the motion for leave to file an amicus brief simply raises the very same issues and states the same position that has been extensively briefed by both respondents. The Court of Appeals presumably recognized that fact when, after considering the Association's arguments in support of the petitioner's motion for a rehearing and suggestion for a rehearing *en banc*, nevertheless denied the motion. The Association's motion for leave to file amicus simply imposes an unnecessary burden on the Court and will needlessly require the Court to expend its valuable judicial resources. Moreover, as discussed in respondent's opposition brief, there is an independent basis for the decision of the Court of Appeals in the case at bar, finding the County of Monmouth liable for the acts of Prosecutor Kaye. In the event that the Court is inclined to consider the Association's motion, respondent respectfully requests the Court to consider this submission which nevertheless dictates that the Association's motion be denied.

POINT II

THE COURT OF APPEALS PROPERLY APPLIED PREVAILING STATE LAW IN REACHING ITS DETERMINATION AND DID NOT VIOLATE THE PRINCIPLES IN ERIE R.R V. TOMKINS

The Association seeks to join in the arguments raised by petitioners that the County should not be liable for the acts of County Prosecutor John Kaye, in the case at bar. In doing so, the Association relies upon the very same argument raised by petitioners (i.e., that the Court of Appeals allegedly violated the principles in *Erie R.R. v. Tomkins*, 304 *U.S.* 64 (1938) by failing to apply the principles established by the Supreme Court of New Jersey in *Lehmann v. Toys 'R Us*, 626 *A.*2d 445 (N.J. 1993) in analyzing the County's liability in the case at bar). However, as explained in respondent's opposition brief and as discussed more fully below, even a cursory reading of the decision of the Court of Appeals reveals that the Court of Appeals did anything ***but*** ignore the decision in *Lehmann.* Rather, the Court of Appeals recognized that in *Lehmann*, the New Jersey Supreme Court set forth the applicable standard to determine whether an employer can be held liable under the New Jersey Law Against Discrimination, *N.J.S.A.* 10:5-1, *et seq.* ("LAD") when an employee raises a hostile work environment, sexual harassment claim against a supervisor. Rather, the court properly found that the New Jersey Supreme Court expressly held this issue open in *Cashen v. Spann*, 66 *N.J.* 541, 324 *A.*2d 81, *cert. denied*, 423 *U.S.* 829 (1975) and then followed New Jersey law in holding that liability was properly imposed upon the County in the case at bar.

The Association recognizes that the agency analysis set forth in *Lehmann* has never been extended by the Supreme Court of New Jersey to apply to cases involving a public employer and specifically to cases involving liability of a county for the acts of a county prosecutor. Certainly, nowhere in the decision in *Lehmann* did the New Jersey Supreme court ever suggest, let alone require, that its agency principles be extended to cases involving liability of a public entity, such a County, for the acts of a county prosecutor.

By contrast, the Association ignores the long line of New Jersey case law followed by the Court of Appeals, that specifically discusses the status of a County Prosecutor and dictates that the County was properly found to be liable for the discriminatory employment decisions of County Prosecutor John Kaye. The Court of Appeals properly relied upon the established case law holding that notwithstanding the fact that a county prosecutor in New Jersey is an independent constitutional officer, the County is properly subject to liability when he acts outside of the scope of his traditional law enforcement duties.

In *Morss v. Forbes*, 24 *N.J.* 341, 132 A.2d 1 (N.J. 1957), the Supreme Court of New Jersey analyzed the role that the county prosecutor plays in New Jersey governmental structure. In doing so, the Court noted that the county prosecutor is a *local official* subject to *county control* and *not* a state official subject to the control of the attorney general. *Id.* at 372. In defining the role that the prosecutor plays in local government, the court in *Morss* agreed that the "prosecutor enjoys a rather unique status with respect to the traditional decision of responsibilities between the executive branch and the Legislature...." *Id.* at 363.

The court found that by provision of the Constitution of 1947, both the attorney general and the county prosecutor are constitutional officers. *Id.* However, while the attorney general, as head of the Department of Law and Public Safety, is within the executive department (Art V., Sec. II, par. 3), the provision for the appointment of prosecutors is found in Art. VII, Sec. ii, par. 1, "Public Officers and Employees." *Id.* Noting that county "prosecutors receive their remuneration from the *county*," the court concluded that the prosecutor is "primarily a local official" and that "[t]here is no equality in statute or dignity with the Legislature." *Id.* at 372.

In *In re Investigation Regarding Ringwood Fact Finding Comm.*, 65 *N.J.* 512, 324 *A.*2d 1, 5-15 (N.J. 1974), The New Jersey Supreme Court held that the county prosecutor was *not* to be considered an executive officer with the privilege to withhold information from the Legislature. *Id.* at 530. In doing so, the court cited *Morss* and found that "although there is still some confusion with respect to the exact status of the prosecutor, there is 'little doubt but that the executive chain of command is *not* sufficiently prominent to enable the prosecutor to claim any high prerogative which might be enjoyed by the state executive with respect to withholding information from the Legislature.'" *Id.* at 519 (emphasis added).

In *Cashen v. Spann*, the New Jersey Supreme Court found that the County Prosecutor was to be considered a state agent where the alleged tortious conduct arose out of the performance of his duties while investigating criminal acts. However, as recognized by the Court of Appeals in the case at bar, the court in *Cashen* was careful to ensure that its holding would not be read too broadly, expressly refusing to decide

whether the prosecutor or his detectives were to be considered state or county employees for other purposes. (Pet. App. 10) The court stated as follows:

> We wish to make it clear ... that our resolution of this issue is limited to the factual circumstances here presented. We find it appropriate to regard the defendant officials as State agents where the alleged tortious conduct arose out of the investigation of criminal activity, but we express no opinion on the question of whether the prosecutor or his detectives can be considered State or county employees for other purposes. We also leave for another day the question of whether a county may be held vicariously liable for the conduct of a prosecutor or his detectives in other circumstances.

Coleman v. Kaye, 87 *F.*3d 1491 (1996) (*quoting Cashen v. Spann,* 66 *N.J.* 541, 552, *cert. denied*, 423 *U.S.* 829 (1975) In doing so, the court noted that "Justice O'Connor warned lower courts to be wary of 'egregious attempts by local governments to insulate themselves from liability for unconstitutional policies.'" (*quoting Cashen*, 66 *N.J.* at 127)

In the companion case of *Dunne v. Fireman's Fund American Insurance Company*, 69 *N.J.* 244, 250, 353 *A.*2d 508 (1976), the court addressed whether the county's insurer was required to pay to defend the suit at issue in *Cashen*, under the terms of its policy with the county. Although the court had previously held that county was not vicariously liable for the alleged acts of the defendant in the case, the court concluded that the insurance policy required the insurer to defend the suit. In doing so, the court recognized an employer/employee relationship between detectives of the prosecutor's office and the county. *Dunne*, 69 *N.J.* at 250-251.

The issue addressed by the Court of Appeals in the case at bar regarding the County's liability under state law was specifically addressed by the Honorable John W. Bissell, U.S.D.J., in an Opinion issued on January 5, 1990, in the case of *Knodel v. the*

Office of the Union County Prosecutor, et al., Civil Action No. 89-2470, United States District Court for the District of New Jersey. (Pet. App. 20) In that case, the plaintiff alleged various unlawful employment practices by his employer, the Union County Prosecutor's Office. Plaintiff asserted claims under both state discrimination laws, as well as federal statutory and constitutional claims. The defendant, County of Union, filed a motion to dismiss the complaint, asserting that Knodel, as an employee of the Union County Prosecutor's Office, and not the County of Union, cannot properly maintain an action against it. The County argued that the Prosecutor's Office is an independent *state* agency that is not controlled by the county government and that, therefore, plaintiff was not a county employee. (Pet. App. 24)

In denying the County's motion, the court examined New Jersey cases discussing the relationship between the prosecutor's office and the county. In discussing the decisions in *Cashen* and *Dunne*, the court found that the New Jersey Supreme Court recognized the dual capacity of employees of the prosecutor's office as both state agents and county employees depending upon the situation. (Pet App. 29-32) The court found that the cases "demonstrate the relationship between the prosecutor and the county." The court recognized that

> [t]he county has the initial responsibility for appropriating the annual budget for the prosecutor's office. Realizing the important role vested with the prosecutor, the legislature provided an additional procedure to obtain funds in excess of the budget by obtaining an order from the assignment judge. This procedure clearly demonstrates the necessity of including the County of Union as a defendant in this action.

(Pet. App. 32)

The court concluded that "plaintiff Knodel has clearly advanced allegations which could lead to the relief he seeks. The fact that county prosecutors' offices have more autonomy from county government structure than other county offices does not mean that the county is free from liability." (Pet. App. 26) *See also, Giuffre v. Bissell*, United States District Court for the District of New Jersey, Civil Action No. 92-2014 (Pet. App. 4) (finding that "[u]nlike the prosecutor in *Cashen* whose abuses arose from actions which fell squarely within the traditional role of a prosecutor, defendant Bissell is alleged to have engaged in more expansive misconduct extending well beyond the reach of his office.")(Pet. App. 18)

As in the cases discussed above, the discriminatory acts committed by Prosecutor John Kaye constituted misconduct that extends beyond the prosecutor's traditional role of law enforcement. Both the New Jersey courts, as well as the District Court of New Jersey, support the finding of the Court of Appeals that the county is liable for the acts of the county prosecutor in this context.

Under the Association's theory, the prosecutor's authority and discretion in making personnel decisions constitutes a license to commit unlawful discrimination without a remedy by the people he or she supervises against their employer. The Association's reliance upon certain decisions finding that, in some circumstances, a County is unable to control the prosecutor's personnel decisions, is misplaced.

For instance, the decision in *In re Middlesex County Prosecutor*, 605 A.2d 265, 255 *N.J. Super.* 333 (App. Div. 1992) does not stand for the proposition that the county could not or would not be liable for the unlawful acts of employment discrimination committed by the county prosecutor. Rather, the court simply upheld an agency

finding that the prosecutor himself was guilty of an unfair labor practice. Significantly, the only claim asserted was against the prosecutor himself and no claim was made against the county. Moreover, in *Middlesex*, the County was attempting to distance itself from the decisions of the County Prosecutor as it related to the County's authority to engage in collective negotiations under the New Jersey Employee Relations Act. By contrast, counties have recognized their potential liability for acts of employment discrimination committed by the county prosecutor as evidenced by the County's continuing commitment to indemnify and defend Kaye in the case at bar. The other cases cited by the Association included a decision of the Law Division which is of no precedential value and merely dealt with issues relating to whether the County was an employer for purposes of a residency requirement (*CWA v. Treffinger*, 677 *A*.2d 295, 291 *N.J. Super.* 376 (Law Div. 1996) and a case involving a challenge to a reorganization plan that created supervisory officer positions with the unclassified civil service of the Prosecutor's investigative staff. (*Zamboni v. Stamler*, 199 *N.J. Super.* 378, 489 *A*.2d 1169 (App. Div. 1985)).

Further, contrary to the assertion of the Association, imposing liability upon the County does further the purpose of the LAD. The term "employer" under the LAD was amended in 1977 to specifically include "all public officers, agencies, boards or bodies." *N.J.S.A.* 10:5-5(e). The Act also expressly defines a public entity to include a "public authority, public agency, and any other political subdivision or public body of the State." *N.J.S.A.* 10:5-5(e). Thus, the LAD recognizes that the County of Monmouth, as plaintiff's employer and as a public entity, bears liability for the acts of John Kaye and its agents. Further, providing an incentive for employers to impose prospective measures to

prevent further discrimination and harassment in the workplace is not the only purpose served by holding an employer liable for the acts of discrimination committed by its agents. Equally as important, if not more, is the policy of providing a remedy for employers and a means of redress for unlawful discriminatory action by the employer that have harmed them. The decision of the Court of Appeals does indeed further the remedial purpose of the LAD by providing a remedy for employees of the county prosecutor's office, such as Ms. Coleman, against their employer, the County of Monmouth. *See Fuchilla v. Layman*, 109 *N.J.* 319, 335, 537 *A.*2d 652 (N.J. 1988) (the LAD was enacted to protect not only the civil rights of individual aggrieved employees but also to protect the public's growing interest in a discrimination-free workplace)

The Court of Appeals, in finding that the Supreme Court of New Jersey would impose liability on the County for the acts of the County Prosecutor, recognized that the County's argument would have far reaching implications that contravene both the express language and the public policy behind the New Jersey LAD. A finding that the County could not be held liable for the acts of John Kaye and or his subordinates under *respondeat superior*, would effectively preclude plaintiff from pursuing an action under the LAD against her employer, the County of Monmouth, for the discriminatory actions of her employer and its agents.

POINT III

THE ASSOCIATION'S ARGUMENT IGNORES THE FACT THAT THE COUNTY IS ALSO LIABLE FOR THE ACTS OF JOHN KAYE'S SUBORDINATES

It is also critical to recognize that the jury verdict against the County of Monmouth was not based upon the acts of John Kaye alone. Rather, the jury found that the County was liable for the acts of John Kaye "*and/or one or more of his subordinates.*" Thus, notwithstanding the Association's argument that Kaye, as county prosecutor is a constitutional officer, the same cannot be said of his subordinates, including assistant prosecutors and investigators.

Even under the Association's argument, assistant prosecutors do not share the same status as the county prosecutor. Assistant prosecutors are hired on the local level as county employees. Certainly, for purposes of a master-agent relationship, assistant prosecutors *must* be considered to be agents of the County. The testimony at trial supports the jury's finding of liability against the county for the acts of John Kaye's subordinates. The evidence established that Assistant Prosecutors William Guidry, Robert Hoenecker and Alton Kenney had direct supervisory powers over investigators of the MCPO and participated in the decision not to promote plaintiff.

Even if assistant prosecutors may have some, albeit an attenuated, relationship to the prosecutor himself, *detectives* of the Monmouth County Prosecutor's Office certainly have no such relationship. Detectives are strictly employees of the county and stand in a master servant relationship with the County. In interpreting the liability of prosecutors under the Tort Claims Act, the New Jersey Courts have recognized a distinction between the acts of

the prosecutor as opposed to investigators employed by the prosecutor's office. *See Hayes v. County of Mercer*, 217 *N.J. Super.* 614 (App. Div. 1987)

The testimony at trial supports a finding of liability against the county based upon the acts of subordinate agents of the MCPO. For instance, the evidence at trial established that Chief Frank R. Licitra was involved in the plaintiff's failure to be promoted in 1989. Plaintiff testified that she asked Chief Licitra why she had been passed over for a promotion and that Chief Licitra stated "it's worse than that, you weren't even considered." Plaintiff also testified that she prepared and delivered a memorandum to Chief Licitra to Prosecutor Kaye regarding her failure to be promoted.

With respect to plaintiff's failure to receive a promotion in May and October 1990, the evidence at trial established that Robert Giaconne received the promotion because the defendant agents of the MCPO believed that he "had a psychological need" for the position. With respect to the plaintiff's failure to receive the promotion in October 1990, defendant agents of the MCPO participated in the decision to offer the position to Philip George, a male investigator with less experience and seniority than plaintiff.

The evidence also established that the evaluation process used by agents of the MCPO in selecting the individuals who were promoted was used to discriminate against the plaintiff as a result of her gender by giving her lower ratings than less qualified males. Additionally, at trial plaintiff produced evidence that the procedures used by agents of the MCPO in making promotions were changed in April 1990 in an effort to disqualify plaintiff from being considered for a future promotion.

Based upon the forgoing, the jury specifically found that John Kaye and/or one *or more of his subordinates* committed discrimination by failing to promote plaintiff in May

1989, June 1990 and October 1990. Thus, in addition to the jury's finding that John Kaye intentionally discriminated against the plaintiff, the jury also found that his subordinates, agents of the MCPO, committed discrimination against the plaintiff rendering the County liable under respondeat superior.

CONCLUSION

Based upon the foregoing, it is respectfully submitted that the Association's motion to file amicus curiae should be denied.

Respectfully submitted,

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No. 96-712

In The

Supreme Court of the United States

October Term, 1996

JOHN KAYE, Individually, and in his capacity as Monmouth County Prosecutor; THE COUNTY PROSECUTOR'S OFFICE OF THE COUNTY OF MONMOUTH; JOHN DOES 1-100; JANE DOES 1-100,

THE COUNTY OF MONMOUTH,
Intervenor in District Court,

Petitioners,

v.

BARBARA COLEMAN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF NEW JERSEY ASSOCIATION OF COUNTIES IN SUPPORT OF PETITIONERS' PETITION FOR A WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF THE NEW JERSEY ASSOCIATION OF COUNTIES IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.2 of the rules of this Court, the New Jersey Association of Counties respectfully moves this Court for leave to file the attached brief *amicus curiae* in support of the Petitioners' petition for a writ of certiorari in this matter. The Petitioners have consented to the filing of this brief; however, the Respondent has refused to provide consent.

The New Jersey Association of Counties ("NJAC") is a private corporation of the State of New Jersey. Its members include each of New Jersey's twenty-one counties. Each county, in turn, is a political subdivision of the State of New Jersey. NJAC speaks for New Jersey's twenty-one counties on issues of legislation affecting county government, and also provides information and support to individual county governments on issues and matters of common concern.

Among the issues facing each of New Jersey's counties is the relationship between the county and the county prosecutor. The prosecutor is appointed by the State of New Jersey, not by county government, and is responsible for acting as the agent of the State in the prosecution of criminal offenders and the enforcement of criminal laws. As discussed in the attached brief, counties serve as the funding agency for county prosecutors; however, New Jersey counties have no control over the personnel decisions made by the prosecutors. Specifically, counties lack control over promotion decisions involving investigators employed by county prosecutors.

In *Coleman v. Kaye*, 87 F.3d 1491 (3d Cir. 1996), the Third Circuit imposed compensatory and punitive damage liability against one of New Jersey's counties in a case involving alleged discrimination under the New Jersey Law Against Discrimination against a female investigator employed by the Monmouth County Prosecutor. The alleged discrimination took the form of repeated failures to promote. In reaching this determination, the Third Circuit ignored the controlling decision of the New Jersey Supreme Court in *Lehmann v. Toys 'R' Us. Inc.*, 626 A.2d 445 (N.J. 1993), which holds that agency principles govern the scope of employer liability for damages under the New Jersey Law Against Discrimination. The Third Circuit also disregarded well-established New Jersey law that holds that the prosecutor is an employer in his/her own right, and that county government has no control over promotion decisions involving investigators employed by the prosecutor.

Each of NJAC's member counties is familiar with the relationship between county government and the county prosecutors. Each of New Jersey's twenty-one counties share a common concern that the Third Circuit's decision below, if allowed to stand, would expose county government to compensatory and punitive damage liability in cases over which county government has absolutely no control. Finally, each of New Jersey's twenty-one counties, as political subdivisions of the State of New Jersey, share a common concern that federal courts apply controlling state precedent when addressing issues of state law, and not feel free to disregard controlling state precedent in an effort to obtain results that federal courts feel to be "correct". For these reasons, NJAC respectfully

requests that it be allowed to participate in this case and to file the attached brief *amicus curiae* in support of Petitioners' petition for a writ of certiorari.

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STATE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

New Jersey Constitution of 1947, Article VII, §11, ¶1, provides:

> County prosecutors shall be nominated and appointed by the Governor with the advice and consent of the Senate. Their term of office shall be five years, and they shall serve until the appointment and qualification of their respective successors.

N.J. CONST. of 1947, Art. VII, §11, ¶1.

The relevant portions of the New Jersey Law Against Discrimination, N.J. STAT. ANN. §10:5-1 to 5-42, are reproduced in the appendix to Petitioners' Petition for Writ of *Certiorari*.

New Jersey Statute §2A:158-5 provides:

> Each prosecutor shall be vested with the same powers and be subject to the same penalties, within his county, as the attorney general shall by law be vested with or subject to, and he shall use all reasonable and lawful diligence for the detection, arrest, indictment and conviction of offenders against the laws.

N.J. STAT. ANN. §2A:158-5.

New Jersey Statute §2A:157-10 provides:

> In addition to the office of county detective, there is created in the office of the prosecutor, the office or position of county investigator which shall be in the unclassified service of the civil service. The prosecutor of each of the several counties of this state may appoint such

> number of suitable persons, not in excess of the number, and at salaries not less than the minimum amounts, in this act provided, to be known as county investigators, to serve at his pleasure and subject to removal by him, and to assist the prosecutor in the detection, apprehension, arrest and conviction of offenders against the law. Persons so appointed shall possess all the powers and rights and be subject to all the obligations of police officers, constables and special deputy sheriffs, in criminal matters.

N.J. STAT. ANN. §2A:157-10.

SUMMARY OF ARGUMENT

The Third Circuit's decision below disregards controlling precedent of the New Jersey Supreme Court concerning liability for compensatory and punitive damages under the New Jersey Law Against Discrimination. The Third Circuit's disregard of controlling state precedent is a violation of the *Erie* doctrine.

The New Jersey Supreme Court has held the scope of employer liability for compensatory damages to be governed by principles of agency law. When considering the liability of the County of Monmouth for the alleged discriminatory actions of the State appointed prosecutor against one of his investigators, the Third Circuit refused to apply theories of agency law, instead opting for a theory of strict liability based on a novel test of the Third Circuit's own creation.

Because the Appellate Court below could find no agency relationship between the County of Monmouth

and the State appointed prosecutor, it determined that liability should nevertheless attach to the County because the County was the government entity to which the prosecutor "most closely belongs" when the prosecutor makes personnel decisions. This determination ignores a multitude of New Jersey case law holding that prosecutors of that state are constitutional state officers and the exclusive employers of the investigators in their offices.

This honorable Court must, therefore, reject the Third Circuit's unwarranted and constitutionally unjustified attempt to disregard the *Erie* Doctrine in such a way as to allow federal courts to disregard the decisions of state courts on issues concerning their respective laws; imposing instead the federal court's view as to how that state law should develop. This honorable Court must also reject the Third Circuit's attempt to reclassify the status of New Jersey's prosecutors for the purpose of imposing liability on New Jersey counties for the prosecutor's actions.

ARGUMENT

POINT I

THE TEST ADOPTED BY THE COURT OF APPEALS FOR THE THIRD CIRCUIT FOR EMPLOYER LIABILITY FOR DISCRIMINATION RESULTING FROM PERSONNEL DECISIONS OF A NEW JERSEY COUNTY PROSECUTOR UNDER THE STATE'S LAW AGAINST DISCRIMINATION RUNS CONTRARY TO THE INTERPRETATION OF THAT STATUTE BY THE NEW JERSEY SUPREME COURT, AND WOULD NOT FURTHER THE PURPOSE OF THAT STATUTE, AS SUCH, THE THIRD CIRCUIT HAS DONE NOTHING LESS THAN RE-WRITE THE DOCTRINE OF *ERIE R.R. v. TOMPKINS*.

Amicus NJAC joins in all arguments presented by Petitioners in favor of granting *certiorari* in this matter. However, NJAC seeks to specifically address the Third Circuit's determination that compensatory and punitive damages in this matter could run against Petitioner Monmouth County, a political subdivision of the State of New Jersey separate and distinct from Petitioner Kaye.

It is a well-settled tenet of federalism that in matters of pendent jurisdiction in which a state's statute is implicated, federal courts must defer to that state court's interpretation of the statute. *See United Mine Workers v. Gibbs*, 383 U.S. 715, 722 (1966) (extending application of the *Erie* doctrine, *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938), to actions in which federal jurisdiction is conferred on pendent grounds to state law claims); *see also R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 381 (1992); *Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 339 (1986).

The Court of Appeals for the Third Circuit has disregarded the New Jersey Supreme Court holding that employer liability for sexual discrimination under the New Jersey Law Against Discrimination ("LAD"), N.J. STAT. ANN. §10:5-1 to 5-42, "shall be governed by agency principles." *Lehmann v. Toys 'R' Us, Inc.*, 626 A.2d 445, 461 (N.J. 1993). The Court of Appeals applied instead a theory of strict liability upon Monmouth County, the government entity to which it felt the prosecutor most closely "belong[ed]," *Coleman v. Kaye*, 87 F.3d 1491, 1503 (3rd Cir. 1996), citing its belief that such a result would be appropriate under the LAD. The Third Circuit reached this conclusion despite its candid admission that *Lehmann* would bar any recovery against Monmouth County. In doing so, the Third Circuit not only disregarded the New Jersey Supreme Court's interpretation of the LAD, but also disregarded New Jersey precedent establishing the county prosecutor as a state official and the Respondent's sole employer for purposes of personnel decisions. As such, to allow the Third Circuit's decision below to stand is to accept a *sub silentio* revision of the *Erie* doctrine; namely, that Federal courts now are free to disregard controlling precedent of a state's highest court to reach a result under state law the federal court feels is "correct." Such an affront against the principles of federalism espoused in *Erie* surely warrants review by this Court.

A. The Controlling Precedent Of The New Jersey Supreme Court, Interpreting The LAD, Establishes That Liability For Damages Under The LAD Must Be Premised On Agency Principles.

In 1993, the New Jersey Supreme Court, following the suggestion of this Court in *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 72 (1986), held in *Lehmann*, that damages are available under the LAD, as against employers in sexually hostile work environment claims, based solely on general principles of agency law. *Lehmann*, 626 A.2d at 460.

Under *Lehmann*, an employer could be held liable for compensatory damages "stemming from a supervisor's creation of a hostile work environment if the employer grants the supervisor the authority to control the working environment and the supervisor allows that authority to create a hostile work environment." *Id.* at 464. This agency theory of liability applies to all cases of discrimination based on sex brought under the LAD, regardless of whether sexual harassment, or sexual discrimination generally, is alleged. *Maczik v. Gilford Park Yacht Club*, 638 A.2d 1322, 1325 (N.J. Super. Ct. App. Div.), *cert. denied*, 649 A.2d 1284 (N.J. 1994).

The purpose of the LAD is to eliminate discrimination and harassment in the workplace. *Lehmann*, 626 A.2d 458. To accomplish this, the State Supreme Court reasoned that:

> the employer must take action, because generally the employer is the party with the power and responsibility to hire, promote, reinstate, provide back pay, and take other remedial action. Likewise, only the employer can impose

> prospective measures to prevent future discrimination and harassment in the workplace.

Id. at 460. Thus, the *Lehmann* Court found that the employer is the party best suited to eliminate workplace discrimination because the employer controls the workplace and the employer-employee relationship. In the State of New Jersey, however, as discussed in subpoint B, *infra*, counties have absolutely no control or authority over the promotion of investigators employed in the various county prosecutors' offices. That authority belongs to the prosecutor exclusively. Thus, the Third Circuit's novel test of imputing liability for compensatory damages to the government entity to which the prosecutor is deemed to "belong," furthers in no way the remedial purpose of the LAD.

By requiring that agency principles govern the scope of employer liability under the LAD, the State Supreme Court furthered the purpose of the LAD by providing employers with a reason to take affirmative steps toward eliminating workplace harassment and discrimination. For example, an employer may mitigate and/or possibly avoid compensatory or punitive damages in sexual harassment cases by demonstrating that it has in place and enforces well-publicized anti-harassment policies, effective formal and informal complaint mechanisms, training, and/or monitoring mechanisms. *Id.* at 463. Application of a theory of strict liability against counties for discriminatory conduct allegedly engaged in by a prosecutor or his/her agents serves in no way to eliminate discrimination in the prosecutor's office, because, as discussed below, counties have absolutely no ability to implement anti-discrimination policies in regard to the

prosecutors' investigators, at least with regard to promotions. Indeed, a strict liability standard for compensatory damages was rejected by the State Supreme Court in *Lehmann*. *Id.* at 449.

B. New Jersey Precedent Establishes That Prosecutors, And Prosecutors Alone, Enjoy Exclusive Control Over The Appointment And Promotion of Investigators; The Counties Are Powerless To Affect Promotion Decisions Involving Investigators.

The Court of Appeals failed to apply New Jersey law to Respondent's LAD claim because, it reasoned, doing so would imply that the prosecutor, a state official and constitutional officer, was not acting on another's behalf when making personnel decisions. *Coleman*, 87 F.3d at 1491. The Court of Appeals found such a result "untenable." There is no support for the Third Circuit's belief that a county prosecutor's personnel decisions must be undertaken on behalf of someone or something other than the prosecutor himself. Similarly, the Third Circuit's distinction between the prosecutor's status when making personnel decisions as opposed to at any other time is artificial and without basis in law.

The county prosecutors of the State of New Jersey are, like its Attorney General, Constitutional officers. *See* N.J. Const. of 1947, Art. VII, §II, ¶1. The office of county prosecutor is " 'carved' out of that of the Attorney General of the State and made an *independent office* having control of the criminal business of the State arising within such county." *State v. Winne*, 91 A.2d 65, 73 (N.J. Super. Ct. Law Div. 1952), *rev'd on other grounds*, 96 A.2d 63 (N.J.

1953) (emphasis supplied); *see Morss v. Forbes*, 132 A.2d 1, 16 (N.J. 1957). As such, the position of county prosecutor has long been recognized as that of a state officer. *See CWA v. Treffinger*, 677 A.2d 295, 299 (N.J. Super. Ct. Law Div. 1996) ("[t]he prosecutor is a constitutional state officer"); *Warren v. Hudson Cty.*, 50 A.2d 877, 879 (N.J. 1947) ("a county board of taxation is just as much a State agency, and its members State officers, as the county prosecutors of the pleas and the judges and clerks of the several district courts of this State are State officers."); *Passaic Cty. Pros. v. Passaic Cty. Freeholders*, 387 A.2d 1219, 1221 (N.J. Super. Ct. App. Div.), *cert. granted and remanded* 391 A.2d 524 (N.J. 1978).

It is the responsibility of the prosecutor and the State's Attorney General to prosecute all criminal business of the State. N.J. STAT. ANN. §2A:158-4 (West 1985). In doing so, each prosecutor is required to use "all reasonable and lawful diligence for the detection, arrest, indictment and conviction of offenders against the laws." N.J. STAT. ANN. §2A:158-5 (West 1985).

> [T]he legislature as well as the county have long recognized the strong policy considerations which dictate that since the county prosecutor is charged with heavy enforcement responsibilities he must be given broad powers to appoint his own personnel. . . .

Cetrulo v. Byrne, 157 A.2d 297, 301 (N.J. 1960). To aid him in carrying out that function, the prosecutor is empowered to appoint and employ assistant prosecutors, N.J. STAT. ANN. §2A:158-5 (West 1985); legal assistants, N.J. STAT. ANN. §2A:158-18.1 (West 1985); detectives, N.J. STAT. ANN. §2A:157-2 (West 1985); and investigators, N.J.

STAT. ANN. §2A:157-10. *"[T]he prosecutor is the exclusive employer and/or hiring authority for his office. The County [does] not hire nor does it employ the members of the prosecutor's office." CWA v. Treffinger,* 677 A.2d at 302. (emphasis supplied) In fact, in *Cetrulo, supra,* the New Jersey Supreme Court held that legislative agencies, such as county freeholder boards, had no authority to appoint assistants to the prosecutor, *id.* at 298; in other words, the New Jersey Supreme Court has held county governing bodies to be *excluded* from such personnel decisions involving the prosecutor's office.

The county serves only as a funding agent to the prosecutor and his staff. N.J. STAT. ANN. §2A:158-7 (West 1985) requires the county in which the prosecutor is appointed to pay "[a]ll necessary expenses incurred by the prosecutor . . . in the detection, arrest, indictment and conviction of offenders against the laws." *Id.* But neither the county, nor its officials, have any authority to direct, discipline, or otherwise control any personnel in the prosecutor's office, including prosecutor's investigators.

In *Zamboni v. Stamler,* 489 A.2d 1169 (N.J. Super. Ct. App. Civ. 1985), the New Jersey Superior Court, Appellate Division, noting the State Supreme Court's recognition that the prosecutor "must have free rein to select and remove" his investigators at will, *Id.* at 1173 (quoting *Cetrulo v. Byrne,* 157 A.2d 302, found the prosecutor to have the "corollary authority to organize and structure his investigative staff consonant with his perception of the particularized needs of his office." *Id.* Thus, the prosecutor's authority to make personnel decisions within his own office is incidental to his responsibility for detection, apprehension, arrest and conviction of criminals through

the use of his office staff. The prosecutor possesses the sole authority to create supervisory investigator positions and to promote employees thereto. *Id.* at 1175.

This authority is not distinct from his responsibility, as a State officer, to prosecute all criminal business of the State. The prosecutor's authority to make personnel decisions is a necessary aspect of his duty to prosecute the criminal business of the State. New Jersey's counties have absolutely no say in those personnel decisions.

In the recent case of *CWA v. Treffinger, supra,* the New Jersey Superior Court, Law Division, held that members of the Essex County prosecutor's office are not subject to the County's employee residency requirement. *CWA,* 677 A.2d at 302. That case involved the attempt by numerous county employee organizations, among others, to have invalidated a residency requirement for all county employees. Among those who filed suit against the County and its County Executive were the Essex County Prosecutor, the Essex County Prosecutor's office, and employee representatives for the assistant prosecutors and detectives and investigators.

After an exhaustive review of the relevant New Jersey statutes and case law, the Law Division found the prosecutor to be the "exclusive employer of his office." *Id.* at 301. For this reason the court found inapplicable to the prosecutor's staff the state statute authorizing residency requirements for employees "employed by the local unit," N.J. STAT. ANN. §40A:9-1.3, i.e., the county. *See CWA,* 677 A.2d at 298-302.

In reaching this conclusion, the *CWA* court relied in part on State court decisions which recognized the prosecutor as his staff's employer for the purpose of negotiating collectively over terms and conditions of their employment. Although the criteria for promotion are not terms and conditions of employment subject to collective negotiation under the New Jersey Employer-Employee Relations Act, N.J. STAT. ANN. §34:13A-1; *et seq.*, procedures for promotion are. *See State v. State Supervisory Employees Assoc.*, 393 A.2d 233, 252 (N.J. 1978).

In *In re Matter of Middlesex County Prosecutor,* 605 A.2d 265 (N.J. Super. Ct. App. Div. 1992), the Appellate Division of the New Jersey Superior Court held that:

> [a]s public employer, the [prosecutor] has the duty under the New Jersey Employer-Employee Relations Act, [N.J. STAT. ANN. §] 34:13A-1, *et seq.*, to, among other responsibilities, maintain terms and conditions of employment and to bargain in good faith with [his staff's bargaining representatives.]

In re Middlesex, 605 A.2d at 269. In that case the State's Appellate Division upheld an agency finding that the county prosecutor, as the public employer of his detectives and investigators, could commit and be held accountable for unfair labor practices. Significantly, no liability was run against the county itself.

The Third Circuit's reliance on *Dunne v. Fireman's Fund Am. Ins. Co.*, 353 A.2d 508 (N.J. 1976), to support its finding that county prosecutors possess a hybrid status is misplaced. In *Dunne,* the New Jersey Supreme Court was called upon to determine who employed three detectives in the prosecutor's office for purposes of coverage under

a Morris County insurance policy. Endorsements to that policy redefined the coverage terms to include an employee of Morris County "while acting within the scope of his duties as such." *Id.* at 510-11. The Court found the detectives to possess a "hybrid status," qualifying as county employees for the purpose of coverage under that specific insurance policy.

The *Dunne* holding is "limited to a determination of who was the employer of the detectives for insurance coverage purposes, *i.e.*, administrative and remunerative purposes." *CWA*, 677 A.2d at 301. The *Dunne* court made no determination as to the employment status of prosecutor's investigators where promotional decisions are concerned. As argued *supra* at 10-12, the Appellate Division of the New Jersey Superior Court in *Zamboni, supra,* has since held that promotional decisions are within the exclusive discretion of the prosecutor, whom the New Jersey Supreme Court identifies in *Dunne* as a "State officer". *Dunne,* 353 A.2d at 510.

It is clear from the above cited case law that contrary to the Third Circuit's finding, county prosecutors are the exclusive employers of the employees in their offices, including investigators. Those employees are employed by the prosecutor to aid him in the enforcement and prosecution of the law. Any personnel decisions made by him, as his staff's employer, are incidental to his responsibilities concerning the criminal business of the state. The distinction the Third Circuit attempted to draw between law enforcement and administrative actions, and the Third Circuit's apparent belief that a prosecutor's personnel decisions must be attributable to some political

subdivision of the State other than the prosecutor himself, finds absolutely no basis in New Jersey law.

C. To Allow The Third Circuit Decision To Stand Would Be To Allow Federal Courts To Disregard Controlling Precedent On State Law Issues And Impose Their Own Sense Of What Results Are "Correct", Such A Result Constitutes A Significant Revision Of The *Erie* Doctrine.

As discussed in subpoints A and B, *supra*, the Third Circuit's decision below disregards controlling precedent of the New Jersey Supreme Court with regard to liability for damages for sex discrimination under the New Jersey Law Against Discrimination. The Third Circuit decision below also disregards well-established state precedent holding the prosecutor to be the sole employer of the investigators he appoints, at least with regard to promotions.

Had the Third Circuit adhered to this controlling precedent and established State law, it would have had no choice but to dismiss all damage claims against Monmouth County. However, the Third Circuit choose to instead apply its own conception of what the "correct" result should be. Such an outcome constitutes nothing less than the substantial revision of the *Erie* doctrine.

Under the *Erie* doctrine, "the law to be applied in any case" other than cases involving federal law

> is the law of the state. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not

> a matter of federal concern. . . . Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or "general."

Erie R.R., 34 U.S. at 78. To do otherwise is to invade rights which are reserved by the United States Constitution to the states themselves. *Id.*, at 79-80. The *Erie* doctrine goes to the heart of the relations between federal governments and the states. Surely, any Circuit opinion that would have the affect of modifying or derogating from this well established doctrine of federalism warrants review by this Court.

The Third Circuit decision below derogates from the *Erie* doctrine by allowing federal courts to take an "outcome determinative" approach to State law issues. Under the Third Circuit approach, if a particular result mandated by controlling state precedent offends what the court believes to be the "correct" result under state law, the federal court is free to disregard the state precedent. Such an approach is not only inconsistent with *Erie*, but would also constitute a major – and unjustified – change in the relationship between federal and state courts. Contrary to *Erie*, it would allow a litigant to obtain a different result based upon whether he or she chose to bring her claim in federal or state court, notwithstanding the fact he or she is asserting a state law claim.

This Court must grant Petitioners' petition to review the Third Circuit's inappropriate attempt to modify the *Erie* doctrine. In the alternative, the Court may, as requested by Petitioners, exercise its authority to summarily vacate the Third Circuit's judgment, and remand the cased to the Third Circuit with instructions to apply

the *Erie* doctrine properly and to reach the result that the Third Circuit itself recognized it was mandated by the decision of the New Jersey Supreme Court in *Lehmann.*

CONCLUSION

It is respectively submitted that Petitioners' Petition must be granted to allow this Court to reject the Third Circuit's unwarranted and constitutionally unjustifiable attempt to re-write the *Erie* doctrine in such a way as to allow a federal court to disregard the decisions of the highest court on issues of State law, and to impose its own view as to how the law of the State should develop. In the alternative, this Court must summarily vacate the judgment of the Third Circuit, and remand with instructions to adhere to the *Erie* doctrine as developed by this Court, and to follow the precedent of the New Jersey Supreme Court on the controlling issues of State law presented herein.

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No. 96-712

In The

Supreme Court of the United States

October Term, 1996

JOHN KAYE, Individually, and in his capacity as Monmouth County Prosecutor; THE COUNTY PROSECUTOR'S OFFICE OF THE COUNTY OF MONMOUTH; JOHN DOES 1-100; JANE DOES 1-100

THE COUNTY OF MONMOUTH,
Intervenor in District Court,

Petitioners,

v.

BARBARA COLEMAN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY BRIEF

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RESPONSE TO THE CORRECTIONS OF MISSTATEMENTS IN THE PETITION.

Despite the fact that the United States District court for the District of New Jersey found as a fact that the county of Monmouth was never served with the complaint; was never a party to the lawsuit; never participated in the lawsuit; and was never given an opportunity to be heard, the respondent asserts that the County participated in the litigation. That the county of Monmouth was never listed on the docket of the United States court for the District of New Jersey remains uncontroverted. The County of Monmouth never received any notices from the court, nor was it invited to participate in the trial. Assertions to the contrary are simply incorrect.

Furthermore, the respondent continues to argue to this Court that the County of Monmouth agreed to have its liability submitted to the jury. That is simply not so. Counsel for John Kaye was the only person who tried the case and who tried it on behalf of Prosecutor Kaye alone. Counsel for Prosecutor Kaye and counsel for the plaintiff both crafted the charge in the District court. However, counsel for Kaye did not represent the interests of the County of Monmouth.

Additionally, the award of punitive damages against the County of Monmouth was challenged as a whole in the District court, in the Court of appeals and in the Petition for Rehearing. The respondent's assertion that it was not raised ignores the language in all the briefs filed in this action. In fact, the very basis of the District Court's opinion was that there could be no award of damages

against the County because the County did not control Prosecutor Kaye.

The respondent admits that the County of Monmouth was never served with a copy of the summons and complaint, arguing only that John Kaye was served, individually and in his capacity as the Monmouth County Prosecutor, and that he accepted service on behalf of the Monmouth County Prosecutor's Office (MCPO). The MCPO is not an agency or department of the Monmouth County government. As noted by this Court in *Brannon v. Holt*, 469 U.S. 464, 472 (1985), and *Monell v. New York City Department of Social Service*, 436 U.S. 653 (1978), service upon a government official is only effective to bind the entity if the department has no greater separate identity from the political subdivision upon which liability is sought.

The factual pillar upon which the District Court's decision rested was that the prosecutor and his office are separate entities from the County of Monmouth. Such a distinction was readily apparent from the proofs presented to the District Court. The prosecutor and his office are creations of New Jersey state statutes. N.J.S.A. 2A:158-1 *et seq.* The prosecutor's office cannot be created, abolished or in any way altered by the County of Monmouth. The County of Monmouth may not hire, fire, promote or demote any of the prosecutors, assistant prosecutors or his investigators or detectives. The office is not bound by any policies adopted by the County of Monmouth nor is the County of Monmouth bound by any policies adopted by the office. Therefore, there exists a separation between the Prosecutor's Office and the County of Monmouth and service upon the Prosecutor's

Office cannot constitute service upon the County of Monmouth. An even more fundamental distinction is that the County of Monmouth was never named in the lawsuit. It was never a party to the lawsuit, it never participated in the lawsuit and it never had an opportunity to be heard in the lawsuit.

POINT I

THE RESPONDENT FAILS TO ADDRESS THE CONSTITUTIONAL IMPLICATIONS OF ASSESSING PUNITIVE DAMAGES AGAINST AN ENTITY THAT HAS NO CONTROL OVER THE ACT OR THE PERSON RESPONSIBLE FOR THOSE DAMAGES

The response to the petition completely ignores the assertion that it violates basic constitutional due process principles to impose liability upon an entity for the actions of an individual over whom it has no control. The Court of Appeals in its opinion clearly and equivocally stated that the County of Monmouth has no control over the action of Prosecutor Kaye, yet ruled that it must be liable for those actions, even when those actions allegedly serve as a basis for punitive damages. There could be no concept more foreign to this Court's notions of due process and fair play. The County of Monmouth cannot in any way control the action's of the Prosecutor which were complained of in this action. It cannot hire, fire, promote or demote any assistant prosecutor or any of the prosecutors or investigators. The response filed by the respondents completely and utterly ignore this point. The purpose of punitive damages is to punish conduct and to deter that type of conduct in the future. The imposition of

punitive damages upon the County of Monmouth for the actions of Prosecutor Kaye serves none of these purposes.

The Respondent has not advanced any arguments in support of the proposition that a governmental entity is liable for punitive damages as a result of the actions of a person over whom the governmental entity exercises no control. Rather, the respondent attempts to cloud the issues by continually referring to a "fact specific" determination by the Court of Appeals that the County of Monmouth was a party to the action and consented to the court's jurisdiction. Aside from the question of whether or not the County was a party to the action, the decision cannot stand.

Even assuming, *arguendo,* that the County waived any jurisdictional objections and was properly a party to the litigation, it does not follow that a governmental entity can be held liable for punitive damages where the entity has absolutely no control over the individual whose conduct forms the basis of the plaintiff's complaint.

The respondent cites two cases in her brief for the proposition that political subdivisions may be liable for the actions of independent constitutional officers even without the ability to control those officers. Both of these cases are readily distinguishable from the present case. The first case, *Holda v. County of Kane,* 89, Ill.App. 3d 522, 410 N.E.2d 552 (Ill. App. 1980), is clearly distinguishable. There were no constitutional due process issues raised in *Holda.* Therefore, the case is inapplicable to this Court's analysis.

A more appropriate citation for this Court's purposes would have been *Freeman v. Fairman*, 916 F. Supp. 786 (N.D. Ill. 1996). In that case, the United States District Court for the Northern District of Illinois clearly enunciated a far more equitable and, it is submitted, persuasive analysis for the purposes herein. The *Freeman* case involved a prisoner who was mistakenly given an overdose of medication at the Cook County Department of Corrections where he subsequently died. Suit was brought against the Cook County Department of Corrections and Cook County. In holding that Cook County could not be responsible for the Department of Corrections, the court noted that

> Under Illinois law, the County has no authority to set policy for the County Department of Corrections (CCDOC) or direct the actions of CCDOC employees. The 7th Circuit has found that "the Cook County Jail and the Cook County Department of Corrections are solely under the supervision and control of the Sheriff of Cook County." (citations omitted) The Cook County Sheriff is an "independently elected constitutional officer who answers only to the elector and not to the Cook County Board of Commissioners."

Freeman, 916 F. Supp. at 789.

Consequently, respondent's assertion that Illinois law and Illinois courts have routinely imposed damages on officers over whom political subdivisions have no control, is without merit. And, more to the point, the law in New Jersey is expressly to the contrary. In *Lehmann v. Toys 'R' Us*, the New Jersey Supreme Court held that in order for punitive and compensatory damages to be

assessed against an employer, the employer must be able to control the employee whose conduct is complained of. *Lehmann*, 132 N.J. 587, 626 A. 2d 445, 460 (1993). That is exactly the opposite of the case here.

Additionally, the citation to *Drake v. City of Rochester*, 96 Misc. 2d 86, 408 N.Y.S. 2d 847 (N.Y.S. Ct. 1978), is similarly distinguishable. In the State of New York, district attorneys are elected officials. Should some event occur during a district attorney's tenure which is unacceptable in its nature, the electorate is free to vote that person out of office. In this case, the County Prosecutors in the State of New Jersey are appointed by the Governor with the advice and consent of the Senate for a term of five (5) years. They cannot be removed by the electorate nor can they be removed by the County Board of Chosen Freeholders.

Given these facts, acknowledged by the United States Court of Appeals for the Third Circuit, what happened below amounts to an *ex parte* judicial determination that a body politic is liable for an individual for both punitive and compensatory damages simply by virtue of that individual's geographic location.

It is telling that the only argument the respondent is able to muster in support of the contention that the County should be liable for the actions of the Prosecutor is a quote from a newspaper article. Comments by Mr. Carton in a newspaper article are completely irrelevant to the issues before this Court. The respondent fails to address this crucial aspect of the decision of the Third Circuit. That decision violates the due process right to the County of Monmouth because it punishes one person for

the acts of another person for whom it has no control. The respondent's brief completely fails to touch upon this key and vital constitutional interest of the County of Monmouth. Consequently, there is a substantial fundamental constitutional wrong which needs to be addressed by this court.

POINT II

THIS COURT SHOULD GRANT THIS PETITION BECAUSE THE UNITED STATES COURT OF APPEALS COMPLETELY DISREGARDS THE HOLDING OF THE STATE'S HIGHEST COURT ON AN ISSUE OF STATE LAW

The Court of Appeals correctly stated the principles established in *Lehmann v. Toys 'R' Us, Inc.*, 132 N.J. 587, 626 A. 2d 445 (N.J. 1933); furthermore, it freely acknowledged that the plaintiff could not have legally met that burden in order to prove employer liability on behalf of the County of Monmouth. Despite that fact, the Court of Appeals ignored the holding of the highest court of a state on a question of state law, and fashioned its own remedy based upon nothing more than conjecture.

In its landmark decision in *Lehmann*, the Supreme Court of New Jersey established a scope of an employer's liability for sexual harassment of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1, *et seq.*, and held that with respect to employer or supervisory liability, strict liability only applies for relief that is equitable in nature. *Lehmann*, 132 at 617, 626 A. 2d at 460. Before an employer can be held liable for compensatory damages, the Restatement (2d) of Agency § 219 tests for a liability of a master of a torts of a servant must be

satisfied. *Lehmann*, 132 N.J. at 618, 626 A. 2d at 461. Finally, *Lehmann* held that punitive damage may be imposed only "when a wrongdoers conduct is especially egregious" specifically, where the conduct was "authorized, participated in, or ratified by the employer." *Lehmann*, 132 N.J. at 624, 626 A. 2d at 464 (citations omitted).

The United States Court of Appeals correctly recognized that under new Jersey law, the County of Monmouth has absolutely no ability to control or effect in any way Kaye's employment decisions. Citing N.J.S.A. Sections 2A:157-2; 2A:157-10; 2A:158-15; 2A:158-18.1. Accordingly, the Court of Appeals recognized that under *Lehmann* the plaintiff could never have proven the County legally responsible for Prosecutor Kaye's acts. Such proofs would have been legally impossible. Apparently dissatisfied with that result, the panel took it upon itself to simply disregard *Lehmann* altogether in favor of a different test. There was a black letter test established in a landmark decision by a state's highest court. When the United States Court of Appeals for the Third Circuit found that the plaintiffs could never have legally met that test, the Third Circuit abandoned the test established by the New Jersey Supreme Court and adopted a new one based upon its own conjecture and guesswork. A more result driven decision is difficult to imagine. With its decision, the Court of Appeals improperly disregarded longstanding doctrines of federalism. Consequently, this court must invoke its jurisdiction to consider such a flagrant violation of the principles established by *Erie*.

CONCLUSION

The petition before the Court raises serious, substantial and important issues which justify the Court's review. The United States Court of Appeals for the Third Circuit committed substantial constitutional errors in its opinion. By allowing the imposition of punitive damages against an entity which has no control over an individual, the United States Court of Appeals for the Third Circuit wandered far afield from this Court's precedents. Additionally, by violating the principles of *Erie*, the Court of Appeals has worked a substantial injustice on the County of Monmouth and has set a dangerous constitutional precedent for counties throughout the State of New Jersey. Consequently, the decision of the United States Court of Appeals for the Third Circuit is constitutionally flawed and presents substantial issues and significant justification for this Court's granting of the petition.

Based upon the foregoing, it is respectfully submitted that the petition should be granted.

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